Docket No. 22-0682

IN THE UNITED STATES CIRCUIT 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 District of Vandalia

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BRIEF FOR APPELLANT

DATE: February 1, 2023 Team Number 23

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JURISDICTIONAL STATEMENT

The district court granted the Vandalia PSC's motion to dismiss on all issues in the same order on August 15, 2022. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1331. Appalachian Clean Energy Solutions, Inc. filed a timely appeal of that order on August 29, 2022. The Petition of Allowance of Appeal was granted on December 28, 2022. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether Appalachian Clean Energy Solutions ("ACES") has standing to challenge the Vandalia Public Service Commission's ("PSC") Capacity Factor Order ("CFO") when the CFO will injure ACES financially by decreasing wholesale energy rates, and such an injury is redressable by this Court's decision to invalidate the CFO.

II. Assuming ACES has standing, whether the PSC's CFO violates the Supremacy Clause of the United States Constitution when Federal Energy Regulatory Commission's ("FERC") Orders 888 and 2000 conflict and field preempt the CFO.

III. Whether the Right of First Refusal ("ROFR") provision of Vandalia's Native Transmission Protection Act ("NTPA") violates the Supremacy Clause of the United States Constitution because it is preempted by FERC Order 1000's express ban on such provisions that influence the interstate wholesale electricity markets.

IV. Whether ROFR provision of Vandalia's NTPA violates the Dormant Commerce Clause of the United States Constitution because it overtly discriminates against out-of-state electrical service provides and unduly burdens the interstate wholesale electricity grid without notable local benefit.

STATEMENT OF THE CASE

I. Factual Background

A. Appellants' efforts to produce clean, efficient, economical electricity via the federally regulated wholesale electricity market.

Appalachia Clean Energy Solutions, Inc. ("ACES") is a global energy company headquartered in Vandalia. R. 4. ACES has adopted a company-wide goal of reaching zero-carbon at all its facilities by 2050. R. 5. These facilities, which include 6.5gigawatts (GWs) of electricity producing facilities and 16,000 circuit miles of transmission lines, solely serve the competitive interstate wholesale electricity market through bilateral agreements with individual retail electric utilities or through the regional wholesale markets served by the various regional transmission operators ("RTOs"). R. 4-5.

As a part of its decarbonization effort, ACES is pursuing two projects that bear on the present dispute. R. 5. First, ACES announced plans to construct a 1,800 MW combined-cycle natural gas power plant in Greene County, Pennsylvania to replace two underperforming coal powerplants scheduled for retirement in 2028. R. 5. The new plant's design utilizes carbon capture and storage technology to take advantage of the 45Q federal tax credit included in the Inflation Reduction Act. R. 5. Pennsylvania legislators have already laid the statutory groundwork for this technology, making the Greene County site an ideal location for such a cutting-edge facility. R. 5.

ACES' second project is a high-voltage transmission line from the Greene County facility to Raleigh, North Carolina. R. 5. The 460-mile line, called Mountaineer Express, would deliver electricity from the Greene County plant to central North Carolina, with the potential for substations to accommodate subsequent integration of resources along the length of the line. R. 5-6. Furthermore, ACES intended to rely on electric utility right of way utility easements permitting them to use existing transmission lines, thus decreasing the overall cost and environmental impact

of the project by mitigating the need to obtain new easements, clear new land, and build new transmission lines. R. 11. The project was approved by the responsible RTO, PJM Interconnect, in accordance with Federal Energy Regulatory Commission ("FERC") Order 1000 in March of 2022 and incorporated into the Regional Transmission Expansion Plan. R. 6.

B. Vandalia's efforts to thwart aces regional wholesale electricity market activity in Vandalia.

Shortly after ACES announced its plans for the Greene County plant and Mountaineer Express, the state of Vandalia set to work in thwarting ACES' plans. Through the responsible government agency, Vandalia PSC ("PSC") and its commissioners Will Williamson ("Chairman"), Lonnie Logan, and Evelyn Elkins, (together "Appellees"), the PSC has taken three actions that work against ACES' projects and give rise to the legal claims made in this action. R. 7-11.

1. The Capacity Factor Order

First, Vandalia's PSC filed a Capacity Factor Order ("CFO") requiring the state's two incumbent retail electricity providers to operate their coal-fired power plants above 75% capacity. R. 7. The two companies, LastEnergy and Mid-Atlantic Power Co. ("MAPCo") are both headquartered in Ohio but operate a total of five coal-fired power plants in Vandalia and serve all 1,050,000 of the state's retail electricity customers. R. 4. In their latest power cost adjustment filings, both utilities projected that capacity at their coal plants was expected to remain at or below 60% due to the availability of cheaper, cleaner energy in the region. R. 7.

These estimates concerned the Vandalia PSC, who responded by issuing the CFO to increase and maintain capacity above 75%. R. 7-8. To assuage any concerns by the financial community about the economic viability of the order, the PSC authorized the utilities to recover costs by

increasing retail rates; in the event that the cost of complying with the CFO was greater than the market-clearing price set by PJM Interconnect. R. 8.

2. Native Transmission Protection Act Right of First Refusal Provision

Second, the Vandalia PSC declined to take action on ACES' application for a Certificate of Public Convenience and Necessity ("CPCN") for its construction of the Vandalia portions of the Mountaineer Express Transmission line. R. 10. In 2014, the state legislature passed the Native Transmission Protection Act ("NTPA"), which included a right of first refusal ("ROFR") provision that permitted incumbent electric transmission owners the right to construct, own, and maintain any electrical transmission line approved by any federally registered planning authority. R. 9. The bill's sponsor described the NTPA as a direct response to FERC Order 1000, which expressly banned ROFR provisions in federal Open Access Transmission Tariffs (OATTs) because such provisions hindered competition and led to increased rates. R. 9. By declining to take action on the ACES CPCN application, the Vandalia PSC is giving LastEnergy and MAPCo, the incumbent beneficiaries of the ROFR provision, eighteen months to decide whether to build and own the Vandalia sections of Mountaineer Express. R. 10.

3. State Right of Way Easement Utility Issues

Third, the Vandalia PSC held that ACES was not a public utility, and therefore was unable to benefit from Vandalia Code §24-8-2, which allows any public utility to use any electric utility easement. R. 11. ACES intended to rely on that provision in its plan for Mountaineer Express but is now prohibited from sharing transmission lines and rights of way easements because of the PSC Order. R. 11. This set back, combined with the uncertainty created by the ROFR provision, calls the very viability of the Mountaineer Express project into doubt. R. 11.

II. Procedural Background

On June 6, 2022, ACES filed suit against the Vandalia PSC, challenging the CFO and ROFR provision. R. 14-15. First, ACES asserted that the CFO was preempted by federal law because it interfered with FERC's exclusive jurisdiction to set interstate wholesale electricity rates. R. 14. Second, ACES challenged the ROFR provision as being preempted by FERC Order 1000, which explicitly prohibits the use of ROFR provisions in interstate wholesale electricity markets. R. 15. Additionally, ACES argued that the ROFR provision violated the Dormant Commerce Clause because it discriminated against out-of-state economic actors in favor of local interests, and unduly burdened interstate commerce in such a way that was clearly excessive relative to local benefits. R. 15. PSC moved to dismiss all claims on June 27, 2022. R. 14. The district court granted Appellee's motion on August 15, 2022, finding against ACES on all claims. R. 16. ACES filed this appeal on August 29, 2022, and requests this Court to reverse the district court's decision. R. 16.

SUMMARY OF THE ARGUMENT

Appalachian Clean Energy Solutions ("ACES") should be able to fairly participate in the regional wholesale electricity market without discriminatory and harmful barriers imposed by Vandalia. This Court should find that the Vandalia Public Service Commission's ("PSC") Capacity Factor Order ("CFO") violates the Supremacy Clause, and that the Vandalia's statutory Right of Right Refusal ("ROFR") violates the Supremacy Clause and the Dormant Commerce Clause. Therefore, this Court should reverse the District Court ruling granting Defendants' Motion to Dismiss.

This Court should find that the Vandalia PSC's CFO violates the Supremacy Clause. First, ACES has standing to challenge the PSC's CFO because ACES will suffer a concrete and particularized future, economic injury that is causally connected to the CFO's promotion of coal-

generated electricity. Such injury can be redressed by this Court by finding the CFO unconstitutional under the Supremacy Clause and invalidating it. Second, assuming ACES has standing, the PSC's CFO violates the Supremacy Clause because it is preempted by the FERC Orders 888 and 2000 pursuant to the Federal Power Act ("FPA") under the doctrines of conflict and field preemption. Under conflict preemption, the FERC orders both preempt PSC's CFO because the CFO directly conflicts with FERC's objective to regulate open, fair, and non-discriminatory access to transmission-owning utilities and RTOs. Under field preemption, the FERC orders preempt the CFO as the CFO infringes on FERC's exclusive jurisdiction over interstate wholesale electricity utility management and operation. Therefore, this Court should find that PSC's CFO violates the Supremacy Clause and reverse the District Court's dismissal.

In addition, this Court should find the Vandalia's statutory Right of Right Refusal ("ROFR") violates the Supremacy Clause and Dormant Commerce Clause. First, Vandalia's statutory ROFR violates the Supremacy Clause because it is preempted by FERC Order 1000 under the doctrines of conflict and field preemption. Under conflict preemption, Vandalia's ROFR statute directly conflicts with FERC Order 1000's explicit ban on ROFR provisions, as well as Order 1000's objective to promote competition in interstate wholesale electricity market. Under field preemption, Vandalia's ROFR intrudes on FERC's exclusive jurisdiction over interstate wholesale rates by interrupting a major interstate wholesale electricity project, causing rates to rise. Second, Vandalia's statutory ROFR violates the dormant Commerce Clause because Vandalia's statutory ROFR discriminates against out-of-state economic actors and unduly interferes with interstate commerce in the wholesale electricity market. The ROFR statute overtly discriminates against out-of-state electricity providers by purposely granting Vandalia's two incumbent utilities the ability to poach project proposals by nonincumbent transmission line

operators. Even if this Court finds the ROFR statute to be facially neutral, it unduly burdens interstate commerce without notable local benefit by effectively shutting down an important, regional electricity transmission project between Vandalia and North Carolina. For these reasons, this Court should find that the District Court for the Northern District of Vandalia improperly granted PSC's Motion to Dismiss by unlawfully preventing ACES from participating in the regional wholesale electricity market and thereby reverse the decision of the District Court.

ARGUMENT

I. Appalachian Clean Energy Solutions has standing to challenge the Vandalia Public Service Commission's Capacity Factor Order under the Supremacy Clause of the United States Constitution.

This court should reverse the District Court ruling and find that Appalachian Clean Energy Solutions ("ACES") has standing to challenge the Vandalia Public Service Commission's ("PSC") Capacity Factor Order ("CFO"). To have standing, the party bringing the suit must establish: (1) that the party suffered an injury; (2) that there be a causal connection between the injury and conduct complained of; and (3) the injury is redressable. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Courts of Appeals review de novo a district court's dismissal of a complaint for lack of standing and for failure to state a claim. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 93 (2d Cir. 2017). Here, ACES will suffer a future, economic injury to the company's bottom line that will be causally connected to PSC's CFO promotion of coal production in the jurisdiction and such injury can be redressed by this Court invalidating the CFO as unconstitutional under the Supremacy Clause. Therefore, this Court should find that ACES has standing in this matter.

A. ACES will suffer a concrete and particularized future, economic injury because Vandalia PSC's CFO is improperly affecting ACES' bottom line.

This Court should find that Vandalia PSC will injure ACES' bottom line when PSC improperly affects wholesale electricity market prices. To constitute an injury under the standing doctrine, courts determine whether the harm is (1) concrete and particularized, and (2) actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. Future economic harm is a cognizable injury warranting standing. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 684–690 (1973) (holding that plaintiffs would suffer economic harm in the future if an order increasing railroad freight rates was not reversed); *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (acknowledging a cognizable future injury was present when an industry would be forced to proceed without important information on price setting).

Here, this Court should find that ACES will face a future, economic injury to the company's bottom line for four reasons. Foremost and fundamentally, the CFO will force ACES to decrease the prices of its wholesale electricity service to the interstate wholesale market, making less profit overtime. The CFO mandates that LastEnergy and MAPCo, Vandalia's only retail utilities, operate their coal-fired plants to achieve a capacity factor of not less than 75%, an increase from their historically economical rates of 40 – 60%. R. 8. As a result, LastEnergy and MAPCo will generate excess electricity, which they will be able to sell back into the market, thus increasing supply and thereby driving ACES' prices down. R. 8 The excess electricity generated by LastEnergy and MAPCo will create a glut in the electricity market and force ACES to reduce their prices to remain competitive, thereby harming their bottom line.

Second, the CFO will generally alter ACES' financial position negatively in the interstate wholesale market. Before the CFO, LastEnergy's and MAPCo purchased electricity from the

wholesale market through PJM, creating demand for electricity generated by ACES that increased prices in the wholesale market. R. 7. After the CFO, LastEnergy and MAPCo will make more energy, and no longer be required to purchase electricity from the wholesale market, decreasing demand and driving interstate wholesale electricity prices down. This market shift, caused by the CFO, will alter ACES' financial position because demand for ACES electricity will decrease.

Third, ACES will be met with grave difficulty keeping their business afloat because the CFO allows instate utilities to not only sell the excess energy they produce to the wholesale market, bringing prices down, but LastEnergy and MAPCo can also recover the excess of the market-clearing price at the expense of retail ratepayers, in addition to what the utilities charge for the excess energy. R. 8. As a result, LastEnergy and MAPCo can set any rates they want because they know they can recoup any lost capital, no matter what. Comparatively, ACES does not enjoy a similar cost recovery mechanism, so ACES will be forced to lower their prices without the ability to recoup any lost capital, thereby harming their bottom line.

Finally, ACES will find it tremendously difficult to overcome the financial burden of building Rogersville Energy Center. Due to the CFO's impact on interstate wholesale electricity prices and ACES' newfound difficulties in remaining competitive in the market, ACES will not be able to afford the cost of Rogersville Energy Center at $3.1 billion. R. 5. The construction of Rogersville Energy Center is even more important considering ACES intended to rely on the Center to keep their business afloat after retiring underperforming ACES coal powerplants before 2028. R. 5. If ACES is prevented from building the Center, ACES will not be able to gain the benefits of the 45Q federal tax credit. R. 5. Furthermore, ACES cannot relocate the Center because the location would be too far from the abundant natural gas supplies from the nearby

Marcellus Shale and unable to benefit from the new local regulations that support companies who use carbon capture technology, like the Rogersville Energy Center. R. 5. These results harm their bottom line, constituting a cognizable injury under the standing doctrine.

The fact that ACES is not a ratepayer is irrelevant because ACES will still face future economic injury due to the CFO. The CFO will force ACES to reduce their prices, alter ACES' position in the market, prevent ACES from recouping sunk costs, and block a key business expansion in the Rogersville Center. As such, this Court should find ACES will face a future economic injury if this Court upholds the approval of the CFO.

B. There is a causal connection between ACES' concrete and particularized future, economic injury and the Vandalia PSC's CFO.

This Court should find that there is a casual connection between Vandalia PSC's CFO and ACES' concrete and particularized future, economic injury. A causal connection exists where the connection is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court. *Lujan*, 504 U.S. at 560. Here, this Court should find that there is a casual connection between the CFO and ACES' future, economic injury to ACES' bottom line. First, the CFO will directly result in ACES' forced reduction in pricing. The generation of excess energy will cause the reduction in energy prices to make up for such excess, thereby forcing ACES to reduce their prices to stay competitive. Next, the CFO will directly result in ACES' departure from the market. With the CFO, LastEnergy and MAPCo are going to make more energy, harming ACES' financial position in the market because less energy will be needed from generators other than LastEnergy and MAPCo.

Ultimately, the CFO will also directly result in ACES' inability to finance the building and operation of the Rogersville Energy Center. Despite ACES' attempt to build the Rogersville Energy Center in southwestern Pennsylvania as opposed to Vandalia, the CFO will still cause

ACES to be unable to afford the $3.1 billion it would cost to build the Center as a result of ACES being forced to reduce the price of energy they can charge, and the restructuring of general business costs ACES must face due to the financial gains of the coal industries in the PJM. As such, this Court should find a causal connection between ACES' future, economic injury and Vandalia PSC's discriminatory conduct against natural gas production.

C. ACES' concrete and particularized future, economic injury can be redressed by this Court's decision to invalidate Vandalia PSC's CFO.

This Court can redress ACES' future, economic injury at the hands of Vandalia PSC. When determining whether a court can redress a party's injury, the court must look to whether a favorable decision will relieve a discrete injury to the plaintiff. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560; *see also Allco*, 861 F.3d at 96 (plaintiff met redressability requirement by demonstrating a state order preemption would likely relieve plaintiff's discrete injury from suffering exclusion and unlawful fees from the state order). The plaintiff does not have to demonstrate that a favorable decision will relieve every injury. *Massachusetts*, 549 U.S. at 525.

In this case, this Court can redress ACES' future, economic injury by finding that the FERC orders preempt the CFO. By finding the CFO unconstitutional LastEnergy and MAPCo would return to historical norms of operation and the state utilities will not be forced to produce electricity at noneconomical capacities that interfere with FERC's federal authority to set interstate wholesale electricity rates. In turn, energy prices in the marketplace would not be distorted, relieving ACES from being forced to reduce their prices, restructure general business costs, or cancel the building and operation of Rogersville Energy Center. As such, this Court should find that redressability can be met before Vandalia PSC poses a grave future economic

injury on ACES. In sum, this Court should find that ACES has standing to challenge the Vandalia PSC's CFO under the Supremacy Clause of the United States Constitution.

II. Vandalia Public Service Commission's Capacity Factor Order violates the Supremacy Clause of the United States Constitution and should be invalidated because it is preempted by the Federal Energy Regulatory Commission Orders 888 and 2000.

This Court should reverse the District Court ruling and hold that the Federal Energy Regulatory Commission ("FERC") Orders 888 and 2000 preempt Vandalia Public Service Commission's ("PSC") Capacity Factor Order ("CFO") under the Supremacy Clause. The Supremacy Clause of the United States Constitution establishes federal law as the "the supreme Law of the Land." U.S. CONST. Art. VI, cl. 2. Under the Supremacy Clause, a court's inquiry into the scope of a federal statute's preemptive effect is guided by the rule that state laws which contradict the purpose of Congress must be preempted. *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 162-63 (2016). The doctrine of preemption requires courts to invalidate state laws that are (1) explicitly preempted, (2) conflict preempted, or (3) field preempted. *Pac. Gas & Elec. Co.*, 461 U.S. at 203–04. The Federal Power Act ("FPA") does not contain an explicit preemption provision, so only conflict and field preemption pertain to this case. Circuit courts review dismissal of preemption claims de novo. *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F. 3d 41, 48-49 (2d Cir. 2018).

The FPA delegates exclusive jurisdiction over the interstate and wholesale electricity generation and transmission markets to the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. §824 (b)(1). FERC exercises this authority by creating orders to promote competition in the wholesale electricity markets. Two orders pertain to this case: Orders 888 and 2000, which together revolutionized fair competition in the wholesale bulk power marketplace and enabled more efficient, lower-cost power. R. 3. In Order 888, FERC reduced discriminatory practices by requiring transmission owners to file open access transmission tariffs and provide separate rates

for transmission and generation services. Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Order No. 888, 61 Fed. Reg. 21, 540, 21, 541 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) [hereinafter Order 888]. In Order 2000, FERC continued to reduce discriminatory practices by encouraging the formation of independent and regionally configured Regional Transmission Organizations ("RTOs"). Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) [hereinafter Order 2000]. In this case, FERC Orders 888 and 2000 both preempt Vandalia PSC's CFO. Vandalia PSC's CFO directly conflicts with and enters the field of FERC regulation by infringing on ACES' access to the market. Therefore, this Court must find Vandalia PSC's CFO unconstitutional under the Supremacy Clause.

A. FERC Orders 888 and 2000 preempt Vandalia PSC's CFO under the Doctrine of Conflict Preemption.

Under the Doctrine of Conflict Preemption, FERC Orders 888 and 2000 preempt the CFO. Conflict preemption requires courts to set aside state laws when it conflicts with federal law, either by rendering compliance with both impossible, or by standing as an obstacle to the full execution of the purposes and objectives of Congress. *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 377 (2015). When a state law stands as an obstacle to Congress' full purposes and objectives to set interstate wholesale electric utility rates, FERC efforts will preempt such state laws. *Hughes*, 578 U.S. at 151 (holding a state's regulatory program was preempted by FERC because the state program had the potential to seriously distort the PJM auction's price signals in conflict with FERCs incentive program); *see also Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 374 (1988) ("States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates"). In this case, FERC Orders 888 and 2000 both preempt Vandalia PSC's CFO as the orders directly

conflict with FERC regulation by infringing on open, fair, and non-discriminatory access to interstate wholesale electricity market.

1. The CFO's direct conflict with FERC Order 888.

The CFO directly conflicts with Order 888's mandate to reduce discriminatory practices within the interstate electricity market in three ways. First, the CFO conflicts with the rationale behind FERC promulgating Order 888 in the first place. In 1996, FERC embarked on the journey to eliminate discrimination and anticompetition in the national electricity market by first issuing Order 888. *See generally* Order 888. However, CFO stands as an obstacle to the full execution of the purposes and objectives of Order 888 because the CFO reduces competitive behavior by diminishing the ability for competitors to sell a sufficient amount of energy to keep up with LastEnergy and MAPCo's low prices. R. 4.

Second, the CFO distorts the PJM auction's price signals. Pursuant to Order 888, FERC outlines a policy goal of removing "impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers." Order 888 ¶1, 4. However, the CFO guarantees LastEnergy and MAPCo a rate distinct from the clearing price for its interstate capacity sales to PJM. R. 8. By allowing Last Energy and MAPCo to dictate their own prices, the CFO directly conflicts with Order 888's policy goals as LastEnergy and MAPCo will dictate the market with their artificially low prices and thereby make it unworkable for ACES to compete with such low prices without going out of business.

Third, the CFO further supports a monopolistic perspective contrary to Order 888. In promulgating Order 888, FERC attempted to diminish monopolistic behavior and thus acknowledged it was within FERC's regulatory field to "determine whether the utility possess monopoly power in a relevant market." Order 888 ¶69. However, the CFO guarantees that LastEnergy and MAPCo will create monopolies. R. 8. Even before the CFO, LastEnergy and

MAPCo are the only two retail utilities in Vandalia, let alone both with a number of plants. R. 4. However, by enforcing 75% capacity factors, such utilities will ultimately cause monopolies in not only the retail space, but production space in Vandalia. R. 3. As a result, LastEnergy and MAPCo will generally occupy much of the market controlled by PJM, which was operating sufficiently when LastEnergy and MAPCo were only producing at a 60 percent capacity factor. As such, the CFO infringes on FERC's regulatory field outlined in Order 888.

2. CFO's direct conflict with FERC Order 2000.

The CFO directly conflicts with Order 2000's mandate to reduce discriminatory practices by encouraging the formation of independent and regionally configured Regional Transmission Organizations ("RTOs"). The CFO conflicts with Order 2000 in three ways: First, the increase in energy production under the CFO directly conflicts with the rationale of establishing PJM in the first place. PJM and other RTOS are established to efficiently and fairly allocate supply and demand in the interstate wholesale market. Order 2000 ¶70. However, the CFO has given LastEnergy and MAPCo a newfound ability to increase supply risk free by ordering them to operate their coal-fired power plants above economical levels and then recoup the costs of those noneconomical operations by charging exorbitant rates to their retail customers. R. 8. Any excess electricity created under the new scheme will be sold back into the FERC-regulated interstate wholesale electricity market, driving up supply and distorting wholesale electricity prices that are directly regulated by FERC and managed by the RTOs. R. 8. By infringing on PJM's ability to manage rates in the interstate wholesale electricity marker, the CFO is directly conflicting with the core mission of PJM as an entity established in Order 2000.

Second, the CFO prohibits PJM from maintaining their independence. RTOs are required to have a decision-making process that is independent of control by any market participants or class of participants. Order 2000 ¶152. However, with the creation of the CFO, the market

participants LastEnergy and MAPCo will be imposing their control on PJM ratemaking regulations by dictating an artificially high generation of energy than PJM has calculated for and predicted in preparation for auctions.

Third, the CFO prohibits PJM from exercising their authority. RTOs are responsible for using their authority to conduct a competitive auction to set wholesale prices for electricity. Order 2000 ¶267; *see also* R. 13. However, with the creation of the CFO, LastEnergy and MAPCo will be circumventing PJM's competitive auction and dictating the way in which prices will fall by decreasing average prices with their excess energy, resulting in a distortion to PJM auction's price signals. As such, the CFO conflicts with Order 2000 because the CFO impairs the core mission of PJM, muddles PJM's independence, and deteriorates PJM's authority.

B. The FPA and the body of FERC constitutes a comprehensive regulatory scheme that bars state regulation under the Doctrine of Field Preemption.

This Court should also hold that PSC's CFO violates the principle of field preemption because it intrudes on FERC's exclusive jurisdiction over the interstate wholesale electricity market. In the FPA, Congress gave FERC exclusive jurisdiction over rates and charges in connection with interstate wholesale electricity system to ensure the market remains just and reasonable. *Hughes*, 578 U.S. at 163 (citing 16 U.S.C. §824d(a)). Although the FPA does not explicitly preempt state action, Congress drew a 'bright line' between state and federal jurisdiction, granting FERC jurisdiction plenary and extending it to all wholesale sales in interstate commerce to promote fairness. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). State laws or programs that infringe on FERC's exclusive jurisdiction, must be invalidated under field preemption. *Hughes*, 578 U.S. at 169.

The Supreme Court and Courts of Appeals continuously field preempt state laws when the law crosses the bright line by interfering with FERC's jurisdiction to determine wholesale rates

in two fashions. First, state laws that impact wholesale rates, either by affectively setting their own rates or indirectly distorting auction price signals, unlawfully inferring with FERC's exclusive jurisdiction. *Id.* at 151 (holding that a state's regulatory program was preempted by FERC in part because the state law functionally set the rates that utilities received for sales in the PJM auction, "striking at the heart of the agency's statutory power"); *see PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014) (ruling a state order was field preempted because it functionally set the rates that utilities receives for its sales in the PJM auction).

Even in cases where a state law was not field preempted by federal law, the courts only made such conclusions when there was not clear interference with FERC's regulatory field, such as wholesale ratemaking. *Zibelman*, 906 F.3d 41 (2d Cir. 2018) (state program creating a zero emissions credit did not undergo wholesale ratemaking because the program (1) provided fixed credit amounts, not allowing utilities to recoup differences in prices, and (2) only considered forecasts of wholesale pricing to regulate environmental attributes, and (3) does not require the involved plants to participate in the wholesale market); *Electric Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (state program creating a zero emissions credit did not undergo wholesale ratemaking because the program did not require utilities to sell power in auction if the utilities received the credit). Second, state laws can impact wholesale rates by altering market participation. *See Zibelman*, 906 F.3d at 52 (acknowledging that a state law could intrude on wholesale rates by compelling wholesale market participation); *see also Hughes, LLC*, 578 U.S. at 166 (acknowledging the importance of terminating programs that are tethered to a generator's wholesale market participation).

In this case, Orders 888 and 2000 preempt the CFO because the CFO crosses the bright line by interfering with FERC's jurisdiction to ensure just and reasonable wholesale rates in two

ways. First, like in *Hughes* and *Nazarian*, FERC Orders 888 and 2000 both preempt Vandalia PSC's CFO as the CFO functionally set the rates that LastEnergy and MAPCo will receive for sales in the PJM auction. Further, this case is unlike *Zibelman* and *Star* because the CFO impacts wholesale rates and auction proceedings. Specifically, the CFO sets rates by mandating LastEnergy and MAPCo generate excess electricity, increasing the supply and decreasing the price they need to charge in the interstate wholesale market to make a profit with such excess electricity, thus distorting auction price signals. Second, FERC Orders 888 and 2000 preempt the CFO because the CFO compels coal-burning utilities to sell their energy into PJM – altering market participation as warned in *Zibelman* and *Hughes*. R. 8 ("All of the coal-fired plants within Vandalia are connected with and exclusively sell into PJM…"). Before the CFO, LastEnergy and MAPCo focused more on the retail side of their businesses, producing minimal electricity through coal. R. 7. However, the CFO will compel wholesale market participation by requiring LastEnergy and MAPCo produce more coal than they organically would in the market. As such, the CFO imposes FERC's regulatory field by impacting wholesale rates. In sum, this Court should find the CFO violates the Supremacy Clause of the United States Constitution because FERC Orders 888 and 2000 conflict and field preempt the CFO.

III. The Native Transmission Protection Act violates the Supremacy Clause of the United States Constitution and should be invalidated because it is preempted by Federal Energy Regulatory Commission Order 1000.

This Court should reverse the district court and hold that the right of first refusal ("ROFR") provision of the Native Transmission Protection Act (ROFR statute) is preempted by the Federal Energy Regulatory Commission's ("FERC") Order 1000. The Federal Power Act ("FPA") delegates exclusive jurisdiction over the interstate and wholesale electricity generation and transmission markets to FERC. 16 U.S.C. §824 (b)(1). In Order 1000, FERC exercised its authority to ban ROFR provisions in Open Access Transmission Tariffs (OATTs), which are

documents governing the planning, management, and rates in the interstate wholesale electricity market. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC 16,051 (July 21, 2011) (codified as 18C.F.R. pt. 35) [hereinafter Order 1000]. Therefore, the ROFR provision of the NTPA is preempted by federal regulation under the Supremacy Clause of the United States Constitution because it directly conflicts with FERC Order 1000 and improperly intrudes on FERC's exclusive jurisdiction in the interstate and wholesale electricity markets.

The Supremacy Clause of the United States Constitution makes federal law "the supreme Law of the Land." U.S. CONST. Art. VI, cl. 2. The doctrine of preemption followed, which requires courts to invalidate state laws that (1) are explicitly preempted by Congress, (2) actually conflict with federal law – "conflict preemption," or (3) intrude on an area of comprehensive federal regulation – "field preemption." *Pac. Gas & Elec. Co*, 461 U.S. at 203–04. Although the FPA does not explicitly preempt state action, the United States Supreme Court has repeatedly reinforced a "bright line" between state and federal that prohibits even indirect state interference with federal jurisdiction. *Mississippi Power & Light Co.*, 487 U.S. at 377. "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure[sic] that agreements affecting wholesale rates are reasonable." *Id*. Circuit courts review dismissal of preemption claims de novo. *Zibelman*, 906 F.3d at 48-49.

Vandalia's ROFR statute must be invalidated because it directly conflicts with Order 1000 and intrudes on FERC's exclusive jurisdiction over the interstate wholesale energy market, violating the principles of conflict preemption and field preemption respectively. The ROFR provision of Vandalia's NTPA directly conflicts with Order 1000, which explicitly forbids the

use of ROFR's in federally regulated markets with the objective of promoting competition and decreasing wholesale rates. Order 1000 ¶7. Furthermore, Vandalia's ROFR statute violates the doctrine of field preemption because the FPA grants FERC exclusive jurisdiction over the interstate and wholesale electricity markets that are being directly and indirectly impacted by Vandalia's ROFR statute. Vandalia's ROFR statute is therefore preempted under the doctrines of conflict and field preemption and must be set aside.

A. FERC Order 1000 preempts Vandalia's ROFR statute because the statute directly conflicts with Order 1000's explicit ban on ROFR provisions and inhibits FERC's ability to promote competition that decreases wholesale rates.

This Court should reverse the district court and hold that Vandalia's ROFR statute is preempted by FERC Order 1000 because it directly conflicts with federal regulation. Under the doctrine of conflict preemption, a state law must be set aside when it conflicts with federal law, either by rendering compliance with both impossible, or by standing as an obstacle to the full execution of the purposes and objectives of Congress. *Oneok*, 575 U.S. at 377. Vandalia's ROFR statute stands as an obstacle to the purposes of federal law in two ways: First, it establishes a ROFR regime that influences the wholesale electricity market where such regimes have been banned under federal law by FERC Order 1000. Order 1000 ¶7. Second, Vandalia's ROFR statute discourages competition by favoring in-state utility companies in direct contradiction of the purpose of FERC Order 1000. Because Vandalia's ROFR statute directly conflicts with both the text and purpose of FERC Order 1000, it is preempted and must be set aside.

Order 1000 banned the use of ROFR provisions in regional transmission planning agreements that affected interstate wholesale rates. Order 1000 ¶7. FERC's primary objectives in issuing Order 1000 were to (1) enhance the efficiency and cost-effectiveness of interstate and wholesale electricity transmission planning processes through non-discriminatory practices, and (2) ensure the costs of transmission solutions are fairly allocated to those who receive benefits from them.

Order 1000 ¶4. FERC concluded that this reform was necessary to promote the "identification and evaluation of more efficient or cost-effective" transmission infrastructure projects; prevent unjust and unreasonable rates for Commission-jurisdictional services; and discourage "undue discrimination by public utility transmission providers." Order 1000 ¶226.

The text of Vandalia's ROFR statute directly conflicts with FERC's explicit ban on ROFR provisions by employing an ROFR provision that allows incumbent utilities to quash projects proposed by interstate wholesale operators. *See* VAND. CODE §24-12.3(d). The ROFR statute permits "any public utility that owns, operates, and maintains an electric transmission line within the state" to "construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan." VAND. CODE §§24-12.2(f);-13.3(d). The statute gives incumbent utility providers eighteen months to decide whether they will exercise the right. VAND. CODE §24-12.3(d). Thus, the ROFR statute gives in-state utilities an unfettered right to poach electricity transmission infrastructure improvement projects from federally regulated non-incumbent wholesale electricity providers in direct contradiction of Order 1000's ban on such preferential provisions. *See* VAND. CODE §24-12.3(d).

The ROFR statute also directly conflicts with the stated purpose of the federal regime, which is to promote just and reasonable electricity rates through transparent, competitive, and non-discriminatory transmission planning processes. *See* Order 1000 ¶1. Vandalia's ROFR statute prevents ACES, a nonincumbent wholesale electricity transmission developer, from acting on its proposal until eighteen months of inaction by the incumbent utilities have elapsed. VAND. CODE §24-12.3(d). This extensive period of delay drastically increases the uncertainty and cost of construction for Mountaineer Express, bringing into question the economic viability of the project. R.11. ACES already invested considerable time and money into planning and gaining

federal approval for the project and made the transmission line a central feature of their carbon zero plan. R. 5-6. Additionally, PJM Interconnect already incorporated the transmission line into the RTEP, making Mountaineer Express a key part of the interstate wholesale electricity transmission system. R. 10. Finally, without Mountaineer Express in its current, regional form, rate payers in North Carolina will be forced to pay for Vandalia's anti-competitive statute in contradiction of federal electricity transmission planning objectives. The ROFR statute directly conflicts with FERCs express ban on ROFR provisions that decrease competition and increase rates in the interstate wholesale market and is therefore preempted by FERC Order 1000.

B. The FPA and the body of FERC regulation constitutes a comprehensive regulatory scheme that bars state regulation under the Doctrine of Field Preemption.

This Court should also hold that Vandalia's ROFR statute violates the principle of field preemption because it intrudes on FERC's exclusive jurisdiction over the interstate wholesale electricity market. Under the doctrine of field preemption, state laws are preempted where federal legislation on the topic is so comprehensive that there is no room for state laws to supplement federal law. *Hughes*, 578 U.S. at 163. In the FPA, Congress gave FERC exclusive jurisdiction over rates and charges in connection with interstate wholesale electricity system, creating a "bright line" between federal regulation of wholesale rates and state regulation of any other sale. *Id.*. (citing 16 U.S.C. §824d(a)); *see also F.E.R.C. v. Electric Power Supply Ass'n,* 577 U.S. 260, 288-89 (2016). Under this arrangement, states may not regulate where FERC has exercised its authority to set just and reasonable interstate wholesale electricity rates or interfere with any agreement that affects those rates. *Mississippi Power & Light Co.*, 487 U.S. at 374.

Here, Vandalia's ROFR statute intrudes upon FERC's exclusive jurisdiction over wholesale energy regulation by interfering with the approval and construction process of a major interstate wholesale electricity transmission project. ACES' proposed transmission line, Mountaineer

Express, seeks to connect ratepayers from Pennsylvania to North Carolina with more efficient, lower cost electricity. R. 5-6. PJM Interconnect has already approved the project and incorporated into their Regional Transmission Expansion Plan (RTEP). R. 6. The Mountaineer Express project aligns with FERC's established policy objectives for cheaper and more efficient interstate electricity services yet is currently being thwarted by an anti-competitive state law that has no place interfering with the federal scheme. R.10. As an interstate wholesale project, Mountaineer Express falls squarely within FERC exclusive jurisdiction, rendering Vandalia's efforts to prevent the project from coming to fruition a blatant interference with FERCs field of regulation. Therefore, this Court should hold that the Vandalia ROFR statute intrudes in a field exclusively regulated by FERC and is therefore preempted by federal law.

IV. Vandalia's Right of First Refusal statute violates the Dormant Commerce Clause of the United States Constitution because it unduly interferes with interstate commerce by blocking the Mountaineer Express Transmission Line.

This Court should reverse the district court and hold that Vandalia's ROFR statute violates the Dormant Commerce Clause because it allows instate utilities companies to block a major interstate wholesale transmission project. The Commerce Clause of the United States Constitution provides that "Congress shall have the Power…[to] regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art. I, §8, cl. 3. The "negative aspect of the Commerce Clause[,]" called the Dormant Commerce Clause, "prevents the states from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (quoting *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 273 (1988) (internal quotations omitted). State laws that discriminate against nonresident economic actors or out-of-state goods, in favor of similarly situated state actors, are subjected to strict scrutiny. *Id*. at 2461; *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (creating a narrow exception to the

Dormant Commerce Clause for facially discriminatory state laws seeking to protect instate economic actors serving a non-competitive, captive market). Even where a law is facially non-discriminatory, it may still violate the Dormant Commerce Clause if it places an undue burden on interstate commerce relative to the supposed local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Circuit Courts review de novo a district court's dismissal of a complaint under Rule 12(b)(6); *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1025 (8th Cir. 2020).

The Fifth Circuit and Eighth Circuits split on whether state ROFR provisions violate the Dormant Commerce Clause. *Compare NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 328 (5th Cir. 2022) (finding Texas' ROFR statute violated the Dormant Commerce Clause), *with LSP*, 954 F.3d at 1031 (finding Minnesota's ROFR statute did not violate the Dormant Commerce Clause). This court should follow the Fifth Circuit and find that Vandalia's ROFR statute violates the Dormant Commerce Clause because it is both overtly discriminatory and unduly burdensome to interstate commerce. *NextEra*, 48 F.4th at 326.

A. Vandalia's ROFR statute overtly discriminates against nonincumbent electricity providers in violation of the Dormant Commerce Clause.

This Court should reverse the district court and hold that Vandalia's ROFR statute violates the Dormant Commerce Clause by overtly discriminating against nonincumbent utilities engaged in the interstate wholesale electricity market. A law overtly discriminates by its text, effects, or purpose. *Bacchus Imports, Ltd. v. Dias*, 468 I.S. 263, 270 (1984). Such discriminatory laws are "virtually *per se* invalid" unless "respondents can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 100-101 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (internal

quotations omitted). Vandalia's ROFR statute discriminates by its text, effect, and purpose, and should be invalidated.

1. Vandalia's ROFR statute is facially discriminatory.

Vandalia's ROFR statute facially discriminates against nonincumbent utilities. A state statute whose text plainly favors instate economic actors over out-of-state actors is facially discriminatory and must be invalidated unless the law is narrowly tailored to advance a legitimate local purpose. *Tenn. Wine & Spirits*, 139 S. Ct. at 2461-62. Such a statute is discriminatory, regardless of the state of incorporation of the interested actors, if it strives to benefit interests better "able to obtain favorable treatment" through "local clout." *NextEra*, 48 F.4th at 322 (citing *Granholm v. Heald*, 544 U.S. 460, 475 (2005)); *see also Lewis v. BT Inv. Managers*, 447 U.S. 27, 42 (1980) (discrimination based on the extent of contact with local community supported Dormant Commerce Clause application).

The Fifth and Eighth Circuits disagreed on whether the respective ROFR statutes were facially discriminatory. The Fifth Circuit in *NextEra* held that "[w]hat matters… is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *NextEra*, at 324 ; *see also* TEX. UTIL. CODE § 37.056(e) (granting an exclusive right to build, own, or operate new lines – including new interstate transmission lines – connected directly to an existing facility to the owner of that facility). Conversely, the Eighth Circuit held that Minnesota's "preference" for utilities owning facilities within the state was nondiscriminatory because it applied evenhandedly to all entities, regardless of where they are based. *LSP*, 954 F.3d 1018, 1028; *see also* MINN. STAT. §216B.246, subdiv. 2. (granting incumbent electrical transmission owners headquartered in Iowa, North Dakota, Wisconsin, and Minnesota an exclusive ROFR to own and construct any electric transmission line approved by a federally registered planning authority). Despite textual

similarities to the Minnesota statute, the Fifth Circuit's decision in *NextEra* should guide this Court's analysis of Vandalia's ROFR statute.

Unlike Minnesota, Vandalia is currently served by only two public utility providers, LastEnergy and Mid-Atlantic Power Co. (MAPCo), both headquartered in Ohio. However, like the utilities in Texas, these corporations have considerable local clout which empowers them to obtain favorable legislation; together, they serve 1,050,000 retail electricity customers in Vandalia, operate five coal fired power plants in Vandalia, and have connections to the state legislature that allowed them to testify in support of the ROFR statute. R. 4, 9. Furthermore, LastEnergy and MAPCo have leveraged this clout to completely block ACES from entering the Vandalia utility market by obtaining a favorable ruling on ACES' request to be declared a "public utility", preventing ACES from using statewide right-of-way easements or exercising a ROFR. R. 11. As in *NextEra*, LastEnergy and MAPCo's considerable local influence prevents those without a presence in Vandalia from entering the state, thus rendering Vandalia's ROFR statute facially discriminatory against all other utilities who lack such clout.

2. Vandalia's ROFR statute has discriminatory effect.

Vandalia' s ROFR statute also has discriminatory effect. Statutes that practically burdens interstate commerce have discriminatory effect. *See Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 350 (1977). Such discriminatory effect can be found in statutes that (1) raise the costs of doing business within the state, (2) strip away the competitive or economic advantages of out-of-state economic actors, or (3) otherwise interferes with the free market by leveling the field to the advantage of instate producers. *Id.* at 351-52.

Here, Vandalia's ROFR has discriminatory effects on the interstate wholesale electricity market by allowing instate, incumbent public utilities to interrupt the interstate transmission line planning process and assume ownership of federally approved projects within state borders.

First, the ROFR provision significantly raises costs for nonincumbent electricity providers by increasing the uncertainty of transmission line planning and potentially rendering associated expenses unrecoverable if the instate utility company exercises their ROFR. Second, the ROFR provision was intentionally designed to strip away the competitive advantage for large, interstate wholesale energy providers like ACES who use in-state transmission infrastructure to streamline their operations. R. 9. Third, the ROFR provision interferes with the interstate wholesale market by manufacturing an economic advantage for noneconomical, environmentally dangerous coal producers when the rest of the national energy grid is moving towards cleaner, cheaper, and more efficient modes of electricity generation. These discriminatory effects render the ROFR statute *per se* invalid.

3. Vandalia's ROFR statute has a discriminatory purpose.

Finally, Vandalia's ROFR statute purposely discriminates because the statute's drafters intended to protect Vandalia's two local utilities. "Where simple economic protectionism is affected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Such protectionism is found in statutes that "overtly block the flow of interstate commerce at a State's borders" or "erect[] barriers to allegedly ruinous outside competition." *Id*. at 624-27. To determine whether a state law is purposely protectionist in violation of the Dormant Commerce Clause, courts look to the legislative history. *See id*. at 625.

The legislative history of Vandalia's ROFR statute reveals its discriminatory purpose. The senator who introduced the bill stated that it was a direct response to the pro-competitive measures of FERC Order 1000. R. 9. Representatives of both of Vandalia's public utility providers weighed in, urging legislators to pass the bill to keep instate transmission lines in the hands of local companies, and to discourage third party transmission owners from buying and

operating transmission services in Vandalia. R. 9. Third-party transmission owners like ACES are uniformly from out-of-state, participate solely in the federally regulated interstate wholesale market, and produce electricity more cheaply and efficiently than the instate utilities protected by the ROFR statute. The discriminatory purpose of the Vandalia ROFR statute is clear.

This Court should reverse the district court and find that Vandalia's ROFR statute is *per se* invalid because it facially discriminates against nonincumbent, out-of-state electricity transmission owners, effecting an impervious bar to third-party entrants to the Vandalia electricity economy that was purposely erected to benefit local utility companies.

B. Even if this Court finds Vandalia's ROFR statute to be non-discriminatory, it violates the Dormant Commerce Clause because it unduly burden's the interstate wholesale electricity grid without notable benefit.

Even if this Court finds that Vandalia's ROFR statute is non-discriminatory, it still violates the Dormant Commerce Clause because it unduly burden's interstate commerce by preventing the Mountaineer Express transmission line, a project that would provide consistent, efficient, and economical electricity service to rate payers from North Carolina to Pennsylvania. R. 5. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (finding minimal state interest in prohibiting interstate shipment of cantaloupes for processing).

Once again, the Fifth and Eighth Circuits are split on this issue. In *NextEra*, the court found it plausible that the state's interest in reliability was "insignificant and illusory" and reversed for greater factual development of the record. *NextEra*, 48 F.4th at 327. Conversely, the Eighth Circuit rejected the nonincumbent's *Pike* claim because state ROFR laws would not "eliminate competition in the market completely," and therefore would not unduly burden interstate

commerce. *LSP*, 954 F.3d at 1031. Once again, *NextEra* should guide this Court's analysis of Vandalia's ROFR statute, which completely eliminates ACES' ability to operate in Vandalia.

The respondents did not argue a single putative local benefit before the district court. R. 16. The legislative history indicates that legislators sought to keep local transmission lines in the hands of purportedly "more responsive" local utilities, but as in *NextEra*, this assertion is unsupported in the record. R. 9.

Balanced against such "illusory" local benefits is the imminent failure of a major interstate electricity transmission infrastructure project, which is now likely to fail because Vandalia's incumbency system and ROFR statute have made the Mountaineer Express project so expensive and uncertain as to render it non-viable. R. 11. This failure will result in higher electricity rates in the thirteen states – and the national capital in Washington D.C. – served by PJM Interconnect. R. 3. This lack of balance must be fatal to the ROFR under the *Pike* Balancing Test and is therefore unconstitutional pursuant to the Dormant Commerce Clause.

This Court should reverse the district court and hold the ROFR unconstitutional under the Supremacy Clause because it is preempted by FERC 1000 under the doctrines of conflict and field preemption. Furthermore, the ROFR violates the Dormant Commerce Clause of the United States Constitution because it discriminates against nonincumbent, interstate wholesale utility operators like ACES and unduly burdens interstate commerce.

CONCLUSION

This Court should reverse the District Courts findings and hold: (1) that ACES has standing to challenge the CFO and (2) that the CFO is preempted by FERC regulation pursuant to the Supremacy Clause of United States Constitution. Additionally, this Court should reverse the District Court's findings with respect to the ROFR statute and hold: (1) that Vandalia's ROFR

statute Vand. Code. §24-12.3(d) is preempted by FERC regulation pursuant to the Supremacy Clause of the United States Constitution and/or (2) that Vandalia's ROFR statute violates the Dormant Commerce Clause because it discriminates against nonincumbent, out-of-state electricity providers and unduly burdens the interstate wholesale electricity market.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing ACES, 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. 23

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