UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY
SOLUTIONS, INC.,
Appellant

-v.- C.A. No. 22-0682

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

On Writ of Certiorari to the U.S. Court of Appeals for the Twelfth Circuit
from the U.S. District Court for the Northern District of Vandalia

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Brief for Appellant

Oral Argument Requested

Team Number 16

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case, docketed as No. 22-0682, pursuant to 28 U.S.C. § 1331 following its removal to federal court under 28 U.S.C. § 1441. The district court's federal question jurisdiction was based on a violation of the Supremacy and Commerce Clauses of the U.S. Constitution. The district court had supplemental jurisdiction of the related state law claims against Vandalia pursuant to supplemental jurisdiction under 28 U.S.C. § 1367.

This Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291. The final judgment that is being appealed disposed of all issues and was entered on August 15, 2022. Any motions for a new trial or other motion to alter the judgment were exhausted before this appeal was filed. ACES filed a timely appeal of the district court's order on August 29, 2022. This is not an appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES PRESENTED

The Vandalia Public Service Commission ("PSC") adopted a "Capacity Factor Order" requiring coal plants in the state to run 75 percent of the time, regardless of the availability of lower-cost power supplies in the region. This order violated the Federal Power Act ("FPA") by effectively fixing wholesale electricity rates and distorting price signals in the PJM market, making it more difficult to build new capacity in the region. In addition, the State of Vandalia enacted a right of first refusal ("ROFR") that gives incumbent owners of electric transmission lines in Vandalia, an exclusive eighteen month right to build new transmission facilities in the state. This directly conflicts with Order 1000 issued by FERC, which required ISOs to eliminate ROFR provisions for regional transmission facilities and ordered new transmission projects to be competitively and planned regionally. Accordingly, this Court should consider the following questions:

1. Whether the district court erroneously dismissed ACES' challenge to the PSC's Capacity Factor Order for lack of standing?

2. Assuming ACES' standing, whether the PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission ("FERC") under the FPA?

3. Whether FERC Order 1000 preempts Vandalia's statutory ROFR, causing Vandalia's statutory ROFR to violate the Supremacy Clause of the U.S. Constitution?

4. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution?

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission ("FERC") is tasked with promoting competition in the wholesale electricity market. (R. 3). FERC implements regulations to balance supply and demand to produce a just and reasonable clearing price. (R. 13). FERC advocated for the creation of Independent System Operators ("ISOs") as one way of satisfying the requirement of providing non-discriminatory access to transmission. *Id.* PJM Interconnection ("PJM") is the ISO responsible for maintaining, operating, and approving new additions to the transmission grid in Vandalia, thirteen other states, and the District of Columbia. *Id.* FERC Order 1000, implemented by PJM, requires a competitive planning process for new transmission facilities to provide nonincumbent developers an opportunity to participate in the regional planning and expansion of the PJM bulk electric system. (R. 6). Currently, Vandalia is served by only two retail utilities, LastEnergy and Mid-Atlantic Power Co. ("MAPCo"). (R. 4).

States within the PJM region also retain authority over siting, routing, and permitting of new transmission facilities. *Id.* Vandalia, a state built on a long tradition of coal mining and the third-largest coal producer in the nation, has enacted legislation aimed at reversing "undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close" and encouraging public utilities to operate their "coal-fired plants at maximum reasonable output and for the duration of the life of the plants." (R. 6-7). The Vandalia senator that introduced the bill described it as a direct response to Order 1000 and representatives from LastEnergy and MAPCo testified the ROFR was necessary to restore the "status quo" from before Order 1000. (R. 9).

The Vandalia Public Service Commission ("Vandalia PSC"), comprised of three commissioners, is the government agency charged with regulating the rates and practices of utilities providing retail service within the state of Vandalia. (R. 6). The Vandalia PSC has a

broad grant of authority under Title 24 of the Vandalia Code to set "just and reasonable rates" for the utilities and has often used their power to ensure coal's continued dominance as a source of energy in Vandalia. *Id.* For instance, the PSC issued a "Capacity Factor Order" on May 15, 2022, stating in part, "The public interest is better served by LastEnergy and MAPCo managing their power supply portfolio in a manner that maximizes generation from their owned coal-fired power plants," and "[it is the] statutory obligation of this Commission to encourage the operation of coal-fired plants at … a capacity factor of not less than 75 percent, as measured over a calendar year." (R. 8). Many groups, including the Vandalia Citizens Action Group (an intervenor representing residential customers) expressed opposition to the capacity factor requirement. *Id.*

Appalachian Clean Energy Solutions, Inc. ("ACES") is a global energy company, headquartered and incorporated in Vandalia, that generates electricity solely for resale in the wholesale markets. *Id.* ACES is gradually decarbonizing its operations by closing its existing coal plants and adding renewable and zero-carbon energy facilities, with the goal of achieving zero carbon emissions by 2050. (R. 5). Specifically, ACES must retire its Franklin Generating Station by December 31, 2028, due to EPA guidelines; in its place, ACES is planning on building a combined-cycle natural gas-fired generating plant, named the "Rogersville Energy Center," for an estimated cost of $3.1 billion. *Id.* Accommodating the electrical output from the Rogersville Energy Center would require ACES to construct a high-voltage transmission line from Rogersville to Raleigh, North Carolina. *Id.* ACES has already received approval to construct the $1.7 billion transmission line ("the Mountaineer Express") from the PJM Board of Managers in March 2022. (R. 6). However, ACES has faced improper obstacles put in place by the PSC because ACES' new transmission line would threaten the existing in-state providers

entrenched in Vandalia politics and would also be based on natural gas and not the coal that the Vandalia's economy relies on. (R. 5).

SUMMARY OF THE ARGUMENT

This Court should overturn the decision of the lower court regarding the Capacity Factor Order because the lower court erroneously determined ARES did not have standing to challenge the Capacity Factor Order. ACES has standing to sue PSC because the Capacity Factor Order infringes upon a legally protected interest and results in an imminent, concrete, and particularized injury that is redressable only by a favorable decision by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Since the Capacity Factor Order prevents construction of the Mountaineer Express—a $1.7 billion transmission line—ACES will suffer an injury-in-fact because the company has already started investing in the infrastructure and permitting for the transmission line. There is a direct causal link between ACES' monetary injury and PSC's Capacity Factor Order, and ACES' injury can only be redressed by this court's decision. *Id.*

In addition, the district court incorrectly determined PSC's Capacity Factor Order does not violate the Supremacy Clause of the U.S. Constitution. U.S. CONST., ART. VI. Cl. 2. Specifically, PSC's Capacity Factor Order should be preempted by FERC's authority in the wholesale electricity market. Under field preemption, a state law is preempted where Congress has "comprehensively legislated an entire field of regulation," which leaves the states with nothing to address. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989). In this case, PSC's Capacity Factor Order is field preempted because it conflicts with FERC's authority to regulate the wholesale electricity market to ensure that all market rates are fair and reasonable. The Capacity Factor Order creates rates in the PJM market that are unfair and unreasonable because it incentivizes the two existing utility companies to recover excessive costs of generation from their customers—households. PSC's Capacity Factor Order would also be field preempted because it impedes FERC's goal of efficiently balancing energy supply and demand. Conflict preemption arises when a state law presents an obstacle to the execution an objective presented by Congress. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015). PSC's Order compels coal-burning utilities to sell their energy into PJM and maintain at least a 75 percent capacity threshold or face severe penalty. Courts have uniformly held this type of coercion by states (promoting coal-burning utilities to sell their energy into wholesale markets) to infringe upon the authority designated to the FPA and FERC. *See Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985); *see also Allco Finance Limited v. Klee*, 861 F.3d 82, 97 (2d Cir. 2017).

This Court should also find that Vandalia's statutory Right of First Refusal violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000. The Supreme Court has held that regulation of the wholesale sale of energy across state lines is up to

federal—not state—control, under the Commerce Clause. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). Congress explicitly confirmed "federal regulation of interstate electric energy transmission…is 'necessary in the public interest,'" in the Federal Power Act of 1935 (FPA). 16 U.S.C. § 824(a). The FPA also established that the Federal Energy Regulatory Commission (FERC) had jurisdiction to regulate "all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1); *see also Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020). FERC saw the problems that the federal ROFR was causing and tried to address the issues in Order 1000 by specifically "direct[ing] public utility transmission providers to remove … any provisions that grant a federal right of first refusal to transmission facilities." (R. 14). Vandalia Right of First Refusal (ROFR) is clearly preempted by FERC Order 1000 because it stands as an obstacle to the FERC's goal of eliminating practices leading to unjust and unreasonable prices and otherwise discriminatory practices.

Finally, this Court should reverse the ruling of the lower court because Vandalia's statutory Right of First Refusal violates the dormant Commerce Clause of the U.S. Constitution. Under the dormant Commerce Clause cases, a state law may not discriminate against out-of-state goods or nonresident actors, unless the state can show the is narrowly tailored to advance a legitimate local purpose. *Tenn. Wine & 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)). Laws that discriminate on their face, in their effects, or in their purpose. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270 (1984). Past courts have found ROFRs that prevent out-of-state entrants from entering a market which affects interstate, to be facially discriminatory. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 326 (5th Cir. 2022). Vandalia's ROFR is facially

discriminatory because the policy presents an obstacle to all nonincumbent utilities, that does not already have established operations in Vandalia, from being able to participate in the interstate electricity transmission market in the region. (R. 4). This discrimination is per se invalid as it is against interstate commerce and in favor of local business or investment. *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y., 511 U.S. 383, 392 (1994). The Supreme Court has rejected the argument that a legitimate government interest may be served by enacting protectionist policies that only benefit a small group of intrastate companies. *Bacchus,* 468 U.S. at 270. The purpose of Vandalia's ROFR is to protect the local coal industry—a non-legitimate purpose—and, as such, the ROFR must be found to be a violation of the Commerce Clause. For the forgoing reason, this Court should find in favor of Appellant-ACES and reverse the ruling of the lower court.

ARGUMENT

I. THE LOWER COURT ERRONEOUSLY DISMISSED ACES' CHALLENGE OF THE CAPACITY FACTOR ORDER FOR LACK OF STANDING UNDER THE FPA.

A. ACES Will Suffer an Injury-In-Fact Because the Capacity Factor Order Prevents Construction of the Mountaineer Express.

ACES can sue for relief under the FPA, for two reasons. First, allowing ACES to sue is consistent with the legislative intent of the FERC. And second, the Capacity Factor Order detrimentally affects ACES' economics of building the Rogersville Energy Facility and the Mountaineer Express transmission line.

ACES has standing to sue PSC because the Capacity Factor Order intrudes on a legally protected interest resulting in an imminent injury, only redressable by a favorable decision by this Court. To establish standing to sue the complainant must have, or bear the imminent risk of, suffering a concrete and particularized injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Further, there must be a causal connection between the injury and conduct brought before the court that can only be redressed by the court's decision. *Id.*; *see also Kansas Corp. Comm. v. FERC*, 881 F.3d 924 (D.C. Cir. 2018) (holding a complainant must affirmatively demonstrate how it is adversely affected by the respondent's actions). Hypothetical injuries, in and of themselves, do not support the finding of an actual or imminent injury. *Lujan* at 564. However, any description of concrete plans, or any specification of when the injury will occur does support a finding of an injury. *See Id*. (explaining that harm that may occur "some day," with no "specification of when the some day will be," does not establish its standing).

Under the FPA, FERC facilitates the regulation of transmission, sale, and generation of electric energy wholesale in interstate commerce. 16 U.S.C. § 824(b). States reserve the authority to control in-state facilities used to generate electric energy, limited only to retail sale. §

824(b)(1). A wholesale sale is a "sale of electric energy to any person for resale." § 824(d). FERC is responsible for ensuring that all rates and charges made, demanded, or received by a public utility for or in connection with the transmission or sale of electric energy must be just and reasonable. § 824d (a). Thus, if "any rate or charge," or "any rule, regulation, practice, or contract affecting such rate or charge" falls short of that standard, FERC must rectify the problem by determining what is "just and reasonable." § 824e(a); s*ee also FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 266 (U.S. 2016) (the clearing price is "the price an efficient market would produce"). FERC Order 1000, implemented by PJM, requires a competitive planning process for new transmission facilities to provide nonincumbent developers an opportunity to participate in the regional planning and expansion of the PJM bulk electric system. (R. 6).

One of the primary goals of the FERC is to promote competition in the wholesale market by extensively regulating the structure of competitive auctions to ensure that they efficiently balance supply and demand to produce a just and reasonable clearing price. *See Id.* at 268 (the clearing price is "the price an efficient market would produce"); *quoting* (R.13). The FERCs was intended by the legislature to provide legal remedies to violative rules or practices that "directly affect the wholesale rate." *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 403 (2004).

In *Kansas Corp. Comm.*, a Kansas energy regulatory body (KCC), lacked standing to challenge the FERC orders. Kansas Corp. Comm. at 931. KCC argued that the FERC acted unlawfully by preapproving rates that help determine retail electric rates charged by public utilities. *Id.* at 926. However, the court evaluated that KCC's injury will not occur unless a series of contingencies occurs at some unknown future time. *Id.* Also, KCC inadequately stated that

FERC's unfavorable rulings render KCC an "aggrieved party." *Id.* at 929. Thus, the court explained that KCC's argument is no more than a generalized interest rather than a concrete and particularized injury. *Id.* at 930.

Conversely in *Allco Finance Ltd.*, a court found standing for an energy bidder to sue Connecticut's energy regulatory body for implementing a statewide plan that had the effect of losing bids and distorting wholesale energy prices in violation of the FPA. *See Allco Finance Limited v. Klee, 861 F.3d 82* (2d Cir. 2017). Among other comprehensive injury theories, the bidder specified that, had the statewide plan been conducted in accordance with the FPA, the regulatory body would have been required to accept bids placed by the bidder. *Id.* at 95. The bidder also properly established that this injury would be redressable if the court declared that the statewide plan was preempted by the FPA. *Id.* at 96. The injury could also be redressed if the court provided an accompanying injunction, stopping the statewide plan and barring the regulatory body from issuing any future plans inconsistent with the FPA. *Id.*

Thus, courts have consistently held that standing exists when there is an affirmative demonstration of a specific injury. Allowing ACES to sue PSC is consistent with FERC's legislative purpose because it furthers the aim of FERC by promoting competition in the wholesale market. (R. 13). ACES also properly establishes causation by showing, had there been no Capacity Factor Order, there would be no barriers to the construction of the Rogersville Energy Facility. (R. 8). Unlike KCC, who inadequately stated that they would be an aggrieved part if a series of contingencies occurs, ACES has a concrete and particularized injury. (R. 5). ACES is subject to a series of events that are certain to occur and result in serve injury if this Court does grant relief. It is certain that ACES is forced to close the Franklin plant before December 31, 2028, because the plant cannot meet the adopted EPA environmental guidelines.

(R. 5). ACES has also expended resources to produce estimated costs of $3.1 billion for Franklin's replacement, the Rogersville Energy Center, and $1.7 billion for the Mountaineer Express needed to increase regional energy capability. Additionally, to encourage timely solutions to the difficulties of building a reliable electric system, ACES has already received approval to construct the transmission line from the PJM Board of Managers in March 2022. (R. 6).

Consequently, ACES will suffer the concrete and particularized injury of having no transmission line to accommodate the electrical output from the Rogersville Energy Center in the wake of the Franklin plant's imminent closure.

B. ACES Can Show That It Is Likely, As Opposed to Merely Speculative, That the Injury Will be Redressed by a Favorable Decision.

This Court can properly redress ACES' injuries by declaring that the Capacity Factor Order is preempted by the FPA and prevents PSC from imposing similar orders. Like the bidder in *Allco*, who specified that the statewide ban caused them to suffer the injury of lost bids, ACES has specified that the Capacity Factor Order causes imminent injury. (R. 7). The Capacity Factor Order intentionally requires Vandalia's coal plants to reverse the positive environmental trends set by FERC, to selflessly sustain the state's prized coal mining industry. (R. 7). This reversal of environmental trends will cause the loss of the Mountaineer Express transmission line that ACES and PJM have already vested interests in meeting deadlines, estimated construction costs, and inclusion in the Regional Transmission Expansion Plan. (R. 6). Accordingly, there is a causal connection between the injury and conduct brought before the court that can only be redressed by the court's decision.

This Court should follow the court in *Allco*, where the court redressed the bidders' injury by declaring the FPA preempted the statewide plan and issuing an injunction to prevent a similar statewide plan in the future. The Capacity Factor Order distorts PJM auction price signals and interferes with FERC's designed method to achieve the goals under the FPA. (R. 14).

Hence, if this Court declares that the FPA preempts the Capacity Factor Order, the market will be restored, and ACES would contribute to achieving the FPA's goals by constructing the Mountaineer Express transmission line.

II. THE CAPACITY FACTOR ORDER VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION BECAUSE THE ORDER IS BOTH FIELD AND CONFLICT PREEMPTED BY FERC'S AUTHORITY OVER WHOLESALE ELECTRICITY SALES.

A. The Capacity Factor Order is Field Preempted Because the Order Clashes With FERC's Regulation of the Wholesale Market and Invades FERC's Authority to Ensure That All Market Rates are Fair and Reasonable.

The Capacity Factor order consists of violative rules and practices that directly affect the PJM wholesale rate, which is preempted by the FPA under the Supremacy Clause. The Supremacy Clause makes the laws of the United States the supreme law of the land. Federal law preempts contrary state law. U.S. CONST., ART. VI. Cl. 2. If Congress has not expressly preempted a state statue, it may do so implicitly through field or conflict preemption. *Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018). Under field preemption, a state law is preempted where Congress has comprehensively legislated an entire field of regulation, leaving no room for the States to supplement federal law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

PSC has implemented regulatory means that intrude on FERC's authority over interstate wholesale rates. *See Hughes v. Talen Energy Mktg.*, LLC, 578 U.S. 150, 164 (2016). In Hughes,

a Maryland program required local utilities to enter a “contract-for-differences" with a favored wholesale plant for 20 years. *Id.* at 158. The contract outlined that when the state-determined contract price is not met by the PJM clearing price, the contract required utilities to pay the deficit. *Id.* Conversely, when the state-determined contract price is exceeded by the PJM clearing price, the plant must pay the difference to the utilities. *Id.* Incumbent plants, within the PJM market, sued and alleged Maryland program incentivizes their favored plant to lowball the clearing price. *Id.* With the guarantee of recovering losses from the retail utilities, Maryland’s favored plant would have an unfair advantage on the market for 20 years. *Id*. Reasoning that Maryland must give plenary authority to FERC, the Court held that Maryland’s program was preempted because it disregards the interstate wholesale rate FERC requires. *Id.* The Court also cautioned that, so long as States do not condition payment of funds on capacity clearing the auction, States can explore other measures to develop generation. *See Id.* at 166.

In the instant case, PSC’s Capacity Factor Order is field preempted because it makes the PJM market rates unfair and unreasonable. Like the “contract-for-differences" in *Hughes*, the Capacity Factor Order unfairly gifts LastEnergy and MAPCo a cost recovery method so that they both can place low bids. (R.8). Essentially, PSC’s Order markets to investors that even if profits are lost in a clearing price bid, the money will still be recovered. (R.8). This practice invades FERC’s comprehensive field authority of the regulation of the wholesale markets and places the power in the hand of PSC.

PSC assets that LastEnergy’s and MAPCo’s FRR status with PJM, not the Order, is the cause of invasion into FERC’s authority. FRR status only requires sale into the PJM. (R. 14). Whereas the Capacity factor requires LastEnergy and MAPCo to sell into the PJM market and incentivizes them to bid inefficient prices, distorting the market prices. (R. 8). Last Energy and

MAPCo are incentivized because the Order allows them to recover costs from retail consumers. (R.8).

Accordingly, like the Court's holding in Hughes, PSC's Order should be preempted by the FERC comprehensive field of regulatory authority.

B. Even If the Capacity Factor Order Is Not Field Preempted It Is Conflict Preempted Because the Order Compels Coal-Burning Utilities to Sell Their Energy Into PJM.

State law is conflict preempted when the challenged state law is an obstacle to the accomplishment and execution of the full purpose and objective of Congress. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015). States cannot compel coal-burning utilities to sell their energy into wholesale markets. *See Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985); *see also Allco Fin. Ltd.*, at 97 (2d Cir. 2017) (arguing that when a State compels wholesale transactions falls squarely within the field that Congress has occupied in the FPA). Compulsion exists when factual allegations support a finding that a party was provoked or obligated to perform a duty. *See Allco Fin. Ltd.* At 98 (finding that the plaintiff failed to provide facts to support compulsion because the state-program did not obligate any utility to accept wholesale bids.)

In the instant case, the Capacity Factor Order compelled LastEnergy and MAPCo to sell their energy to PJM because they were obligated to increase capacity factors to 75 percent or more. (R. 8). Prior to the Capacity Factor Order's implementation, neither LastEnergy nor MAPCo retained a plant with a capacity factor over 63 percent. (R. 7). The power cost adjustment testimonies reveal that both utilities had low-capacity factors because cheaper regional energy supplies were available. (R. 8). Yet, in conflict with FERC goal to ensure efficient balance of supply and demand, the Capacity Factor Order obligated both utilities to

ramp up the operation of their coal-fired plants. (R. 8). The Capacity Factor Order also required both utilities to obtain coal supplies to maintain sufficient inventory consistent with the order. (R.8). Because the utilities are obligated to increase their capacity, with an incentivized cost recovery tactic, the Capacity Factor order impermissibly compels the coal-burning sale into the wholesale market.

Therefore, under conflict preemption, the Capacity Factor Order is an obstacle to FERC's goal to ensure efficient balance of supply and demand.

III. VANDALIA'S STATUTORY RIGHT OF FIRST REFUSAL VIOLATES IS CONFLICT PREEMPTED BECAUSE IT STANDS AS AN OBSTACLE TO THE OBJECTIVES OF ORDER 1000.

Article Six Section two of the U.S. Constitution declares that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." Further, *United States v. Lopez* establishes that Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. 549, 558 (1995). Congress may also regulate activities, even intrastate activities that "substantially effect" interstate commerce. *Id.* at 559.

Conflict preemption applies "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) (quoting *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.*

A. The FERC Has Exclusive Authority Over the Wholesale Transmission Market and Thus, Has the Power to Eliminate Practices That Are Harmful to Wholesale Transmission Needs.

The transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can interfere with broader national interests. *Old Dominion Elec. Coop. v FERC*, 898 F.3d 1254, 1257 (D.C. Cir. 2018). It has already been determined by the Supreme Court that the Commerce Clause prevents the states from regulating the wholesale sale of energy across state lines. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). In the Federal Power Act of 1935 (FPA), Congress declared that "that federal regulation of interstate electric energy transmission and its sale at wholesale is 'necessary in the public interest.'" 16 U.S.C. § 824(a). Congress also established the predecessor organization to the Federal Energy Regulatory Commission (FERC) and gave it jurisdiction to regulate "all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1); *see also Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020) (noting that the Federal Power Act provides FERC with "exclusive authority over" the wholesale transmission market). Due to the evolution of how energy is produced and consumed, the FERC has shifted its focus from setting wholesale market prices to concentrating on enhancing competition. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016).

The "purpose and intended effects" of Order 1000 is to eliminate the practices that may undermine the identification of more efficient or cost-effective transmission needs and result in unjust, unreasonable or otherwise discriminatory practices. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities 18 C.F.R. Part 35 (Order 1000) ¶ 226; *Crosby,* 530 U.S. at 373. The court in this case need not guess at the intentions of

the FERC because they have been plainly laid out. The FERC explained that ROFR provisions disincentivizes nonincumbent transmission developers from committing its resources to a potential transmission project when it there is a risk of an incumbent transmission provider exercising its federal right of first refusal once the benefits of the transmission project are demonstrated. Order 1000 at ¶ 257. Additionally, the Commission explains that it would not be in the economic self-interest of incumbent transmission providers to allow new providers to develop transmission facilities even if the proposals submitted would be more cost-effective or more efficient at meeting the regional needs. *Id.*at ¶ 256. The FERC thus concludes that the mere existence of ROFR may be leading to rates that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers. *Id.* at ¶ 226. Therefore, the implementation of Order 1000 is designed to eliminate the practice of ROFR.

In the present case, the Vandalia Right of First Refusal (ROFR) is clearly preempted by FERC Order 1000 because it stands as an obstacle to the FERC's goal of eliminating practices leading to unjust and unreasonable prices and otherwise discriminatory practices. In accordance with Order 1000, PJM implemented a competitive planning process designed to include non-incumbents, in accordance with Order 1000 and hopefully "encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system. (R. 4). Despite PJM's efforts, Vandalia's statutory ROFR circumvents not only PJM's goal of creating efficient, cost-effective and timely solutions but also creates a sufficient obstacle to the FERC's stated goals. The ROFR allows LastEnergy and MapCo to block movement and progress on the transmission line for up to 18-months, significantly slowing progress. (R.4). Additionally, these discriminatory practices against ACES and all nonincumbents would serve to disincentivize nonincumbents from participating in competitive planning process for fear that

plans will be simply scooped up by incumbents. Therefore, the statutory ROFR stands as a significant obstacle to FERC's stated goals and is preempted.

IV. VANDALIA'S STATUTORY RIGHT OF FIRST REFUSAL VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT EXPLICITLY DISCRIMINATES AGAINST INTERSTATE COMMERCE AND IS CLEARLY EXCESSIVE TO LOCAL BENEFITS.

The Commerce Clause of the United States Constitution gives Congress express authorization to regulate interstate commerce. U.S. CONST., ART. I. § 8 Cl. 3. There is not an express provision about State power over interstate commerce, but the negative or dormant implication of the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & 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)).

There are three categories for dormant Commerce Clause analysis. A law can discriminate on its face, in its effects, or in its purpose. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270 (1984). Laws that explicitly discriminate against interstate commerce are presumptively unconstitutional and are subject to strict scrutiny review. If the statue impermissibly discriminates, then it is valid only if the state can show that it has no other means to advance the legitimate local interest under strict scrutiny. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392 (1994). Additionally, even if the statute is determined not to discriminate, the burden on interstate commerce cannot be "clearly excessive" in relation to the local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

A. Vandalia Right of First Refusal Is Facially Discriminatory Against Interstate Commerce.

Vandalia's Right of First Refusal is facially discriminatory on an instrument of interstate commerce. The Supreme Court has already recognized the national implication of the interstate electricity market and the Constitution gives Congress the ability to protect consumers from self-serving state regulations that would defeat out-of-state competition and unjustly and unreasonably raise prices. *Ark. Elec. Co-op Corp.* 461 U.S. at 377. Vandalia's Code § 24-12.3(a) effects an instrumentality of interstate commerce by severely hindering competition for the construction of the Mountaineer Express transmission line.

A ROFR that prevents out of state entrants from entering the market is still facially discriminatory even if the right favors incumbents that are incorporated in other states. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 326 (5th Cir. 2022). In *NextEra,* an out of state transmission line company put in a bid with the Public Utility Commission of Texas (PUCT) to build a new transmission line across the state. *Id.* at 308. The bid was accepted by PUCT but before NextEra could get the necessary certificate of convenience and necessity the state enacted a new law which barred nonincumbents from being able to enter the Texas transmission-line market. *Id.* When addressing the dormant Commerce Clause challenge to the Texas law, the court overturned the motion to dismiss holding that place of incorporation was not controlling but rather that the law "prevents those without a presence in the state from ever entering the portions of the interstate transmission market . . .." *Id.* at 324. Thus, even if incumbents are incorporated in other states, a law that prevents out of state entrants from entering the market is still facially discriminatory.

The lower court has erred by holding that the place of incorporation controls dormant Commerce Clause violations. The Court below and Minnesota's Eighth Circuit have taken the

opposite stance, holding that the preference for incumbents was not discriminatory because it applied to all entities regardless of whether they are based in-state or elsewhere. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020). That holding, however, is incongruous with previous reasoning form the Supreme Court. As reasoned by the Fifth Circuit, the Supreme Court has already ruled that the heart of the dormant Commerce Clause concern is that "when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 (1945)). In accordance with that reasoning the 11th and 1st circuits have rejected place of incorporation as being controlling in whether a law violated the Dormant Commerce Clause. In *Fla. Transp. Sercs., Inc. v. Miami-Dade County*, the court explains that if the court were to use place of incorporation as controlling, then "dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." 703 F.3d 1230,1259 (11th Cir. 2012).

Vandalia right of first refusal facially discriminates against interstate commerce. In order to be considered an incumbent the organization must be "[A]ny public utility that owns, operates, and maintains an electric transmission line in this state; …or any ... entit[y] ... engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia." Vand. Code § 24-12.2(f). That essentially means that ACES or any transmission company that is not already doing business within the state of Vandalia is prevented from entering this transmission market while those like

LastEnergy and MapCo, that have established operations in the state are free to take up opportunities for new construction. It is not enough that LastEnergy and MapCo are incorporated outside of Vandalia. Like the ROFR in Texas, here, the law is still discriminating against interstate commerce because it prevents any utility that does not already have established operations in Vandalia from being able to participate in the portion of the interstate transmission market that runs through the state (R. 4); Vand. Code § 24-12.3(a). Like the holding in Texas, the court should find that it is nonsensical to hold that dormant Commerce Clause concerns are alleviated by the "empty formality" of where that a business's articles of incorporation were filed. NextEra (quoting *Fla. Transp. Sercs., Inc*, 703 F.3d at 1259).

B. Vandalia PSC Does Not Have a Legitimate State Interest In Discriminating Against Interstate Commerce.

State laws enacted with discriminatory purpose violate the Commerce Clause of the U.S. Constitution. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Discrimination against interstate commerce in favor of local business or investment is per se invalid, except for a narrow class of cases in which a municipality can demonstrate under rigorous scrutiny that it has no other means to achieve a legitimate local interest. *C & A Carbone, Inc., N.Y.,* 511 U.S. at 392. The Supreme Court has made clear that economic protectionism or, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors, are subject to strict scrutiny and a finding of protectionist measures can be made on the basis of either purpose or effect. *Bacchus,* 468 U.S. at 270. In *Bacchus*, the state of Hawaii enacted a law that exempted brandy distilled from the root of an indigenous shrub from the 20% tax of liquor sold at wholesale. *Id.* at 266. The court noted that it need not guess at the legislatures motive for enacting this law because it was stated by the senate. *Id.* at 270. The state declared that it enacted this law to promote and encourage the development of the local liquor industry. *Id.* In an attempt

to differentiate itself from similar legislation that had been previously held as unconstitutional, the State claimed that it was not attempting "to enhance thriving and substantial business enterprises at the expense of any foreign competitors" but rather subsidize financially troubled industries peculiar to Hawaii. *Id.* at 272. The Supreme Court was not persuaded by the argument that the goal of the legislation was to promote local industry rather than discriminate against foreign product. *Id.* at 273. The Supreme Court held that this type of economic protectionist law, was discriminatory in purpose and effect and therefore violated the Commerce Clause. *Id.* It can therefore be concluded that laws enacted with discriminatory purpose violate the Commerce Clause.

The Vandalia code protecting the ROFR is discriminatory in its purpose thus making it unconstitutional. Like *Bacchus,* Vandalia's purpose in reinstating its ROFR is clear. Vandalia is a community built on a long tradition of coal mining, with coal being one of the state's biggest industries for decades. (R. 6). Vandalia being the third-largest coal producer in the nation and coal being a vital part of the state economy, it is easy to understand why the legislature would enact directives aimed at reversing "undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close" and encouraging public utilities to operate their "coal-fired plants at maximum reasonable output and for the duration of the life of the plants." (R. 6-7); Vand. Code *§ 24-1-1D(5); id. § 24-1-1D(12).* Making the purpose of this legislation even more evident, the senator that introduced the bill described it as a direct response to Order 1000 and representatives from Vandalia's two coal-fired utilities testified that the ROFR was necessary to restore the "status quo" from before Order 1000 and urged the Senate Committee not "to encourage third-party transmission owners to buy and build transmission service in Vandalia." (R. at 9). ACES is not only an out of state provider, but it's new transmission line

would also be based on natural gas and not the coal that the Vandalia's economy relies on. (R. 5). Much like *Bacchus*, the court need not guess at Vandalia's motivation for enacting the ROFR. *Bacchus*, 468 U.S. at 271. The purpose of the ROFR was to enhance the local coal industry, which is of peculiar interest to Vandalia, because of the long history and economic reliance on coal in Vandalia. Just as in *Bacchaus*, this protectionist purpose is a violation of the Commerce Clause and unconstitutional.

C. Even If the ROFR Is Found Not To Discriminate Against Out-Of-State Commerce, the 18-Month Decision Period Creates a Burden That Is Clearly Excessive In Relation To Local Benefits.

Even if a ROFR provision is found not to discriminate against interstate commerce it can still be a violation of the dormant Commerce Clause if it the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

In the Eight Circuit a Minnesota ROFR law allowed an incumbent electric transmission owner 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." *Sieben*, 954 F.3d at 1024. Incumbent transmission companies had to exercise this ROFR within 90 days. Minn. Stat § 216B.246, subdiv. 3. After being challenged, this law underwent the undue burden test from *Pike*. It was determined that the local burden on interstate commerce did not outweigh the local benefit of preserving the historically proven status quo for the constructing and maintenance of transmission lines because incumbent transmission owners did not have to exercise the ROFR, and the court felt that the state ROFR law did not eliminate competition in the market entirely. *Sieben*, 954 F.3d at 1031.

Here, Vandalia's ROFR states:

> 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. If such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

Vand. Code § 24-12.3(d). This law as well as the stated reason for the law are very similar. Vandalia's stated local benefits would be to keep transmission lines int the hands of more responsive companies and maintain the "status quo" before Order 100. (R. 9). However, there is one large difference that separates Minnesota and Vandalia. Minnesota's ROFR period only lasts for 90 days whereas Vandalia gives incumbent owners 18 months. Minn. Stat § 216B.246, subdiv. 3; *Vand. Code § 24-12.3(d).* Though 90 days may not be enough to substantially burden interstate commerce, a time period that is 6 times that long is clearly much more substantial. New entrants to the market would be severely discouraged from participation given that the plans they propose can be stalled for well over a year only to then taken away by an incumbent transmission owner. Unlike Minnesota, this statutory period would likely be enough to eliminate competition in the market entirely. In this case the burden on interstate commerce is clearly excessive in comparison to the local benefit. Therefore, the ROFR fails the *Pike* balancing test and violates the dormant Commerce Clause.

CONCLUSION

We respectfully request this Court reverse the decision of the U.S. District Court for the Northern District of Vandalia and remand with further instruction to establish that:

1. ACES has standing to challenge the Capacity Factor Order,
2. Vandalia PSC's Capacity Factor Order violated the Supremacy Clause of the U.S. Constitution,
3. PSC's ROFR for transmission lines violated the Supremacy Clause of the U.S. Constitution, and
4. PSC's ROFR for transmission lines violated the dormant Commerce Clause of the U.S. Constitution.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing APPALACHIAN CLEAN ENERGY SOLUTIONS, INC., Appellant (*Team No. 16*), 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. 16