IN THE 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 appeal from a U.S. District Court order from the Northern District of Vandalia.

BREIF FOR APPELLANT
APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

Team 34

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Jurisdictional Statement

This case challenges a final action of the Northern District of Vandalia dismissing the claims brought to the district court under 28 U.S.C. §1331. The federal questions presented arose under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Supremacy Clause, U.S. Const. art. VI, cl. 2. The district court dismissed on August 15, 2022, and Appalachian Clean Energy Solutions, Inc. (ACES) timely appealed on August 29, 2022. The twelfth circuit has jurisdiction over this appeal of a final action pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

Four questions are presented:

I. Whether ACES has standing to challenge the PSC's Capacity Factor Order (CFO);

II. Assuming ACES has standing, whether the PSC's CFO 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;

III. Whether Vandalia's statutory Right of First Refusal (ROFR) violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000; and

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

Statement of the Case

Appalachian Clean Energy Solutions, Inc. (ACES) is a global energy company that builds and operates electrical generating plants and interstate electric transmission lines. *R*. at 1. They are headquartered and incorporated in Springfield, Vandalia. *Id.* at 4. ACES' electric generation portfolio includes wind and solar facilities, nuclear plants, coal-fired generators, and natural gas fired plants. *Id.* ACES' Franklin Generating Station, a coal fired plant, currently sells into the

PJM Interconnection (PJM) and is looking to construct an additional PJM generator, the Rogersville Energy Center, a natural gas plant, in Pennsylvania. *Id.* at 5. ACES has also received approval from PJM to construction the Mountaineer Express, a transmission line that will run from Rogersville to North Carolina. *Id.* However, recent enactments by the Vandalia Public Service Commission (PSC) are threatening both projects by interfering with the interstate energy market and distorting costs making both projects uneconomical.

I. The Capacity Factor Order

The Federal Power Act (FPA) created the Federal Energy Regulatory Commission (FERC) which was designed to promote interstate wholesale energy competition leading to a fair marketplace. *Id.* at 3. PJM is an Independent System Operator created by the FERC to ensure that the mid-Atlantic region had "open, fair, and non-discriminatory" access to transmission lines and a competitive wholesale energy market. *Id.* The PJM serves all of Vandalia. *Id.* While states have control over "siting, routing, and permitting of new transmission facilities," the FPA gives the FERC exclusive jurisdiction over the interstate wholesale energy market. *Id.*

The PJM ensures a just and reasonable energy rate using energy and capacity auctions. *Id.* Energy auctions give PJM power to buy energy from generators and then sell that energy to load service entitles (LSE), also called utilities. *Id.* Based on the need for the next twenty-four hours generators bid into the market to try and sell their energy. *Id.* Generators bid as low as they economically can to clear the market. *Id.* When the supply matches the demand, the cheapest energy is purchased, and the most expensive of that energy sets the market-clearing price. *Id.* This price is then paid to every bid that cleared the auction. *Id.*

The capacity auction functions similarly, but its goal is to ensure that enough capacity is being created to meet anticipated future demands. *Id.* The PJM predicts energy demand three years into the future and assigns a share of that demand to each participating LSE in the region. *Id.* Then generators sell their capacity in the same form as the energy auction to the PJM who then accepts bids until the anticipated capacity is satisfied. *Id.*

The need for coal has been decreasing nationwide. *Id.* at 4. This has affected the mining industry in Vandalia, a historically coal driven economy. *Id.* They are a net producer of energy and 91 percent of their net generation comes from coal. *Id.* Only half of the electricity they produce is used in the state. *Id.* They are served by two retail utilities, LastEnergy and Mid-Atlantic Power Co. (MAPCo) who also operate the coal generators located throughout the state. *Id.* A generator's capacity factor is the percentage of electricity they produced compared to the maximum potential they could produce. *Id.* at 7. For example, a 50 percent capacity factor means the generator operated half of the time. *Id.* One reason a coal generator is not able to operate at 100 percent is due their inability to clear the energy market with the rise of cheaper energy sources. *see Id.* In 2021, between LastEnergy and MAPCo the highest capacity factor was 62.3 percent, the lowest was 34.7 percent, and the average was 50 percent. *Id.* ACES' Franklin coal-fired plant decreased from 46.9 percent in 2020 to 38.2 percent in 2021. *Id.* at 5.

To counter act the market trends, the Vandalia PSC issued the Capacity Factor Order (CFO) which required coal-fired generators in Vandalia to operate at a capacity factor of 75 percent. *Id.* at 7. This is a 50 percent average increase from the generators 2021 production rates. See *id.* Further, the CFO promises to subsidize Vandalia's coal fired generators by paying the difference between the cost to produce the electricity and the market-clearing price of the PJM. *Id.* at 8. The PSC contends that the subsidy will never go into effect based off their belief that the market clearing price will be greater than the cost of production. *Id.* However, MAPCo and LastEnergy predicted, before the CFO was passed, that their capacity factor will not be greater than 60 percent going forward, and the Vandalia Citizens Action Group also believed that the PSC was incorrect. *Id.* at 7. They estimated that the capacity factor would only economically fall in the 40 to 60 percent range. *Id.* at 8.

By subsidizing their generators based on market participation and demanding an increased participation in the interstate wholesale market, the CFO will decrease the market-clearing price and hurt the business of their competitors. The CFO, by interfering with the interstate wholesale market, by setting the rates of their coal-fired generators, and interfering with the mechanism ensuring a just and reasonable rate, has implemented laws within the FERC's exclusive jurisdiction over the interstate wholesale market.

II. Transmission Lines

Prior to 2011, a large portion of FERC-approved ISO tariffs included right-of-first-refusal ("ROFR") provisions. *R* at 9. These provisions provided owners of existing transmission facilities the absolute right to construct new transmission facilities in their areas. *Id.* In 2011, FERC issued Order 1000, which eliminated ROFR provisions for regional transmission facilities from FERC-approved tariffs and agreements. *Id.* In addition, this directive ordered new transmission projects to be planned by entities like PJM. *Id.* Responding to Order 1000, in 2014 Vandalia's state legislature passed the "Native Transmission Protection Act," which grants incumbent transmission owners the exclusive right, for a specified period, to construct transmission lines within Vandalia. The purpose of the bill was to restore "a federally recognized right of first refusal." *Id.* A representative from LastEnergy, an incumbent transmission owner in Vandalia, testified in support of the bill and argued its adoption was necessary to restore the "status quo" from before Order 1000. *Id.*

The bill passed Vandalia's Senate and House and was signed into law on May 3, 2014. *Id*. The bill is written as follows:

> 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 an 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).*

The statute defined an "incumbent electric transmission owner" as:

> [A]ny public utility that owns, operates, and maintains an electric transmission line in this state; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any … entit[y] … engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia. *Vand. Code § 24-12.2(f).*

ACES currently does not own any existing transmission facilities in Vandalia. As such, they do not qualify as an incumbent transmission owner. *R.* at 10.

The Mountaineer Express project was approved by PJM for the inclusion in the Regional Transmission Plan (RTEP) in March of 2022. *Id.* Afterward, ACES applied for a Certificate of Public Convenience and Necessity (CPCN) to commence construction of the Vandalia portions of the Mountaineer Express with the Vandalia PSC on April 1, 2022. *Id.* Because of Vandalia's ROFR legislation, the Vandalia PSC has not acted on ACES' application. *Id.* Vandalia's two incumbent transmission owners, LastEnergy and MAPCo, have 18 months (until September 30, 2023) to decide whether to utilize their ROFR. *Id.*

III. Procedural History

On June 6th, 2022 ACES brought claims against Chairman Will Williamson, Commission Lonnie Logan, and Commissioner Evelyn Elkins in their official capacities as officials of the Vandalia PSC. (Referred to as PSC). *Id at 1*. ACES challenged both the CFO and the ROFR. ACES argued that the CFO was preempted by the FPA, because it sets the rates of Vandalia's coal fired generators through its subsidy and demands increased participation in the wholesale market. *Id.* at 14. These provisions interfere with the exclusive jurisdiction of the FERC and, using the court's guidance in *Hughes,* should be preempted*. Id.* Defendant argued that Plaintiff lacked standing, and that the CFO is "untethered" to the wholesale market. *Id.*

As to the ROFR claim, ACES argued that Vandalia's ROFR legislation is preempted by the FPA and directly targets FERC's authority. *Id* at 15. Second, ACES argued that the ROFR, through its face, effects, and purpose, violates the dormant Commerce Clause in that it discriminates against out-of-state actors like ACES. *Id*. Defendant argued that there was no preemption and that the law did not discriminated against out-of-state entities. *Id.* at 16. The defendant moved to dismiss the claims and the judge granted the motion. *Id.* at 16. ACES timely appealed on August 29, 2022. *Id.*

Summary of the Argument

ACES should prevail over the first question at bar. ACES has established standing by showing an injury-in-fact, causality, redressability, and that their protected interest at stake is in the zone of interest created by the FPA. The court has long recognized that increased competition creates a valid injury-in-fact for standing. *See Clinton v. City of New York*, 524 U.S. 417, 433, 118 S. Ct. 2091, 2100, 141 L. Ed. 2d 393 (1998). As a competitor in the PJM auction, ACES will be injured through the CFO's subsidizing completion that will affect the market rates. Further, the injury is imminent due to the market trends for the diminishing use of coal and the past records which show coal generators at a less than 75 percent capacity. This injury can be redressed by the court by finding the policy is unconstitutional and preempted by the FPA.

ACES should prevail over the second question at bar. The CFO is both field and conflict preempted. The court in *Hughes* set forth specific rules that a statute is preempted when it sets the rates of generators through subsidies and demands market participation. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 166, 136 S. Ct. 1288, 1299 (2016). The CFO set the rates of Vandalia's coal fired generators by subsidizing them to the cost of production and demands increased market participation by increasing their capacity factor to 75 percent. Further, the CFO is conflict preempted because its rate-setting and mandated market participation will drastically effect the auction prices. These practices will cause clear damage to the auction and will interfere with Congress' goal of setting just and reasonable rates of wholesale energy. *See 16 U.S.C. §824d(a)*.

ACES should prevail over the third question at bar. Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution, because it is preempted by FERC Order 1000. Courts have found that state laws must submit to federally mandated laws in two circumstances: when Congress intends for a federal law to "occupy the field," any state law in that area is preempted. *California v. ARC Am. Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989). Regardless if Congress indented to or has not occupied a specific area, a state law is preempted if it directly conflicts with a federal statute. In this case, FERC's Order 1000 specifically prohibits ROFRs. *R* at 9. Vandalia's ROFR legislation, however, directly targets Order 1000 and aims to nullify the elimination of ROFR provisions. Because the FERC is congressionally mandated under the Federal Power Act, where state law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives," courts have implied conflict preemption. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). By directly aiming to nullify a federally issued mandate, Vandalia's ROFR is preempted.

ACES should prevail under the fourth question at bar. Given that the framers of the Constitution ensured that Congress has the power to regulate commerce between states and foreign entities, states cannot enact protectionist laws that aim to disrupt or inhibit that commerce. U.S. CONST. art. I, § 8, cl. 3. Because Vandalia's ROFR legislation, on its face, through its purpose, and through its effects discriminates against nonincumbent providers, it directly violates the dormant Commerce Clause. Courts have well established that such laws that possess this "in-state" requirement is unconstitutional under the dormant Commerce Clause. *Tenn. Wine & Spirits*, 139 S. Ct. at 2457 (holding that an in-state residency requirement that "blatantly favors the State's residents" is unconstitutional). Further, the burden imposed by Vandalia's ROFR is clearly excessive compared to any specific local benefits it provides. In order to enter the market, nonincumbent entities would have to purchase incumbent entities. in addition, in assessing burden, courts also examine "what effect would arise if not one, but many or every, State adopted similar legislation." Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989). If every State adopted a law like Vandalia's ROFR, it would lay waste to FERC's efforts to diminish federal rights of first refusal and reduce competition in the transmission market.

Argument

I. ACES HAS STANDING TO CHALLENGE THE CAPACITY FACTOR ORDER BECAUSE ACES WILL SUFFER AN IMMINENT INJURY AND ACES' INTEREST AT STAKE IS PROTECTED BY THE FPA.

This court should reverse and remand because ACES has established standing before the court. To establish standing a plaintiff must show both Article III and judicially made prudential standing. *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364366 (D.C. Cir. 1998). Article III standing is met when a plaintiff suffers an imminent injury in fact that is "fairly traceable" to a conduct and that the injury can be redressed by the court. *Id.* Prudential standing is met when the interest the plaintiff is seeking redress is within the zone-of-interest created by the statute being enforced. *Id*. By relying on precedents that allow for competitors in business to assert injury from a governmental policy that subsidizes other competitors, this court should find that ACES has standing.

A. ACES has Article III Standing because the Capacity Factor Order will imminently injure all competitors in PJM's energy auction.

The court should find that ACES has standing because the CFO will imminently cause a financial competitive injury that is redressable by the court. To have Article III standing requires (1) that the plaintiff suffered an injury-in-fact, (2) that is fairly traceable to the challenged action, (3) and that this court could redress the injury. *U.S. Telecom Ass'n v. F.C.C.,* 295 F.3d 1326, 30-31 (D.C. Cir. 2002) (quoting *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). A plaintiff establishes injury-in-fact when it has identified the invasion of a judicially recognized interest that is concrete, particularized, and actual or imminent. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351,357 (1992). Probable economic injury caused by actions that "alter competitive conditions" satisfy the injury-in-fact requirement. *Clinton*, 524 U.S. at 433. Competitors "almost surely" will suffer a constitutional injury when agencies allow increased competition. *Sherley v. Sebelius*, 610 F.3d 69,71 (D.C. Cir. 2010); *U.S. Telecom Ass'n*, 295 F.3d at 31; *La. Energy*, 141 F.3d at 367. Direct payment of a subsidy is sufficient to confer standing. *Sea-Land Serv., Inc. v. Dole*, 723 F.2d 975, 78-79 (D.C.

Cir. 1983) (operating as a competitor without a subsidy is competitive injury-in-fact). The injury-in-fact is satisfactorily imminent when it will almost surely cause a decrease in competitor's business. *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995).

ACES suffers an injury in fact from the PSC's CFO as both a ratepayer and interstate competitor. The Defendant has conveniently forgotten that ACES is headquartered in Springfield, Vandalia. As a company physically located in the state, ACES is required to pay utilities on the energy it consumes. ACES is therefore a ratepayer, the retail customer, directly mentioned in the CFO who will pay for the subsidy given to both LastEnergy and MAPCo. ACES therefore has established a particularized financial injury as a ratepayer caused by the CFO.

ACES also currently operates an interstate coal generator in the PJM, the Franklin Generating Station, that sells into the energy auction. ACES is a competitor to both MAPCo and LastEnergy, through mutual participation in the PJM. The subsidy will allow Vanadlia's coal generators to distort the market clearing price, take potential revenue from ACES, or even prevent them from selling at all. Subsidized energy being sold into PJM's energy market distorts the market clearing price and injures the potential income for participants. The CFO generators need to sell their mandated 75 percent production at any price, to ensure that it is not wasted. This pushes the market clearing price down because more energy is offered at a lower rate. In turn, this lowers the sales of other energy sources and could potentially prevent generators from participating in the market at all. This subsidy is therefore a clear injury upon ACES' Franklin Generator.

The CFO also forces Vandalia coal generators into the interstate market and particularly the PJM auction. The CFO indirectly mandates interstate market participation by requiring energy production that goes far beyond Vandalia's possible energy needs. The capacity factors for LastEnergy and MAPCo's coal generators in Vandalia during 2020-2021 were all lower than 75 percent. The lowest was operating at 34.7 percent, the highest was 62.3 percent, and the mean was 50 percent. The CFO would, therefore, be mandating a 50 percent average increase in production to meet the required 75 percent capacity factor. In 2021, Vandalia was already a net generator of electricity and half of the electricity they produced fulfilled the state's needs. The rest was sold in other states. Any policy that demands an increase in generation when there is already a surplus, is mandating that the energy be sold elsewhere, across state lines.

Further, the CFO generators are forced into the PJM auction. Generators who sell their energy across state lines can either form bilateral contracts with LSEs or participate in the energy auction. *Hughes*, 578 U.S. at 150. However, bilateral contracts are subject to a reasonableness review by the FERC. *Id.* Due to the reasonableness review, Vandalia's coal generators would not be able to enter bilateral contracts. To pass the FERC's reasonableness review, the generators would need to sell at cost, because anything else would distort the fair market price. Removing demand from the market by selling energy for less than cost would be deemed unreasonable, because it distorts a just market. With one of their two options being subject to review, the CFO generators must sell into the PJM.

The market is also more likely than not to continue its current trajectory decreasing its dependance on coal making the subsidy imminent. ACES, MAPCo, and LastEnergy all projected a decrease in their capacity factors for the foreseeable future. ACES Franklin coal-fired plant decreased from 46.9 percent in 2020 to 38.2 percent in 2021. MAPCo and LastEnergy both expect their capacity factors to remain at or below 60 percent going forward. There has been a national decrease in the use of coal since the shale revolution and it is continuing. Defendant's point to PSC's opinion that Vandalia's coal plants could economically be able to run at 75 percent capacity, even though it is contrary the energy plants' own predictions and Vandalia Citizens Action Group's assessment that generators could only be expected to run economically for 40 to 60 percent of the time.

While an increase in the production of coal did occur after adjusting from post-COVID 19 lockdowns, a prediction that the capacity factor for coal generators would reach 75 percent is outrageous. The Energy Information Administration released a report showing the average coal generator's capacity factor order from 2012 to 2022. U.S. Energy Information Administration, *Electric Power Monthly: Table 6.07.A. Capacity Factors for Utility Scale Generators Primarily Using Fossil Fuels*, https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_ 6_07_a, (last visited Jan. 21, 2023). The highest the average capacity factor reached during and post the pandemic was 65.6 percent in August 2021. *Id.* The lowest the capacity factor since August 2021 was 37.6 percent, April 2022. *Id.* Based on available data there is no reasonable foundation for the belief that Vandalia's coal would be economical at a 75 percent capacity factor order. The subsidy provision in the order would be necessary for both companies to comply with the CFO. *Id.* Because of the subsidy's imminent implementation and the injuries that will be sustained by ACES, ACES has met the standard for an injury-in-fact.

The causation and redressability elements are straightforward. By interfering with the interstate market, the CFO will damage the profits of the competition. As explained, it lowers the market clearing price and therefore limits what competitive generators can sell their energy for. The court can redress the injury by holding that the CFO is constitutionally preempted by the FPA and the actions of the FERC. This court should find that ACES has met their Article III standing requirement.

B. ACES has prudential standing because it has an interest in the just and reasonable interstate wholesale market created by the FPA.

ACES also has prudential standing because their interest are protected by the FPA. The prudential requirement is met when "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statue in question." *La. Energy*, 141 F.3d at 367. Courts have previously recognized injuries to the "just and reasonable" interest create by the FPA as grounds for competitors to achieve prudential standing. *Id.* at 364 (plaintiff brought a challenge to a permit granted by the FERC as an interference with their interest in a just and reasonable market).

The CFO interferes with ACES interest in a just and reasonable market created by the FPA. Under the FPA, all rates made in the sale energy in the interstate market shall be just and reasonable. U.S.C. §824d(a). PJM's energy auction is "per se just and reasonable." *Hughes*, 578 U.S. at 163. By interfering with the energy auction and distorting its price, the CFO interferes with ACES' legal interest created in the FPA to a just and reasonable interstate wholesale market.

II. PSC'S CAPACITY FACTOR ORDER IS FIELD AND CONFLICT PREEMPTED BY THE FPA.

This court should reverse and remand the case because there is a plausible argument that the CFO is preempted by the Federal Power Act. The supremacy clause ensures that federal law is the supreme law of the land; therefore, it necessarily preempts state law. *Hughes*, 578 U.S. at 162. Courts have considered two types of implicit preemption that both apply against Vandalia's CFO: field and conflict preemption. *Id.* at 163. Both methods apply to the CFO and make it unconstitutional. It is field preempted because it will interfere with FERC's exclusive jurisdiction by settings interstate wholesale rates, intentionally influencing interstate purchasers, and indirectly mandates generators to participate in the interstate market. The CFO is conflict preempted because it will result in clear damage to Congress' goals of a just and reasonable wholesale energy rate by directly setting unjust and unreasonable rates and indirectly exacerbating their effects.

To survive a motion to dismiss a plaintiff need only assert a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Using the Supreme Court's precedence in *Hughes*, a legal claim is plausible. 578 U.S. at 166. Because the CFO is both field and conflict preempted this court should reverse the lower court's ruling.

A. The Capacity Factor Order is field preempted because it intrudes on FERC's exclusive jurisdiction by disregarding wholesale rates, intentionally influencing purchasing decisions, and mandating participation in the interstate market.

The court should reverse and remand the case because there is a plausible claim that that the CFO is field preempted by the FPA. A state statute is field preempted when it "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). In the FPA, Congress gave exclusive jurisdiction to the FERC over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(a). The FERC ensures that "[a]ll rates and charges made, demanded, or received by any utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission…shall be just and reasonable." *Id.* The FPA allocates state's authority over generation facilities and other sales of electricity. *see §824(b)(1)*. However, the "FPA leaves no room either for direct state regulation of the prices of interstate wholesale or for regulation that would indirectly achieve the same result. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 288 (2016), *as revised* (Jan. 28, 2016) (internal quotes removed).

States are allowed to enact laws within their jurisdiction in the energy market even if they indirectly affect interstate wholesale rates. *Zibelman*, 906 F.3d at 53. However, state laws are preempted when they "disregard a wholesale rate determine[d] by the FERC" or "tether" funding on wholesale market participation. *Hughes*, 578 U.S. 150, 166 (2016) ("We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC."); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 254 (3d Cir. 2014). Further, state laws are preempted when the purpose of their law "is to influence purchasing decisions of interstate [markets], however that rule is labeled." *N.W. C. Pipeline Corp. v. State Corp. Commn. of Kansas*, 489 U.S. 493, 518 (1989).

In *Hughes*, the Supreme Court held that state laws disregarding the FERC market price were preempted by the FPA because they directly interfere with FERC's exclusive authority over the wholesale energy rates of interstate commerce. 578 U.S. at 166. To encourage the development of new generators, Maryland required a new generator to enter a contract for differences with an LSE. *Id.* at 164. The contract required participation in the PJM's capacity auction and guaranteed a stable price for its sale. *Id.* The LSE would subsidize the generator if the price auction clearing prices were lower than the contract price. *Id.* at 159. Even though states can regulate generators, the court held that the statute was preempted because "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rate." *Id.* at 164. Further, the statute was preempted because it disregarded an interstate wholesale rate. *Id*.

PSC's CFO program should be preempted because it impermissibly disregards interstate wholesale rates, its purpose is to influence the purchasing decisions of the interstate markets, and it indirectly demands generators participate in the interstate markets. First, the CFO disregards interstate rates for MAPCo and LastEnergy's coal-fired plants. The CFO allows for cost recovery for coal plants to recover up to actual costs of production if actual costs are greater than the market clearing price. This provision ensures that the generators are not subjected to the free market pressures of PJM's auction. The CFO completely disregards the mechanism ensuring a just and reasonable market and substitutes it for PSC's own, putting the CFO directly in the FERC's exclusive jurisdiction. This is nearly identical to the system the court rejected in *Hughes*. When Maryland ensured a contracted price rather than PJM's market clearing price, the court found that it disregarded the interstate wholesale rate. So now that PSC is guaranteeing actual costs rather than PJM's market clearing price, the court should find that the PSC is disregarding the interstate wholesale rate. Therefore, like the court in *Hughes*, this court should find the CFO is preempted.

Second, the purpose of the CFO is to influence the purchasing decisions of interstate markets. PSC enacted this provision to appease the interests of the generators who did not believe the mandated increased energy rate would clear the auction. Because the coal-fired generators have a guaranteed price coming from Vandalia's subsidies they become price takers, where generators bid their electricity for at zero dollars per MW and sell at market clearing price. By incentivizing this kind of business dealing, utilities are influenced to buy Vandalia's coal even though it is not subjected to the free-market auction device. The purpose of the CFO matches that of Maryland's in *Hughes*. Just as the court saw Maryland's provision as interfering with the wholesale interstate market and therefore was field preemption, this court should find that PSC's purpose was to interfere with the wholesale interstate market and is therefore field preemption.

Third, the CFO mandates participation in the wholesale market and is, therefore, preempted. Courts have long considered that if a state compels interstate wholesale, then it is preempted by the FPA. *See Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99 (2d Cir. 1985) (Did a governmental policy indirectly "compel [a company] to make those sale in order to remain whole and thus regulate[ ] those sales?”); *Zibelman,* 906 F.3d at 52 (The analogous question her would be whether ZECs compel generators to make wholesale sale); *Allco Fin. Ltd. V. Klee*, 861 F.3d 82, 97 (2d Cir. 2017)(Asking whether a policy compels generators to participate in the wholesale market). Because a state regulation cannot indirectly achieve a result they could not directly achieve, the CFO also is field preempted by indirectly requiring wholesale market participation. *Electric Power Supply Ass'n,* 577 U.S. at 288.

The PSC is requiring interstate wholesale sales by mandating energy production that goes far beyond Vandalia’s possible energy needs. As discussed in depth in argument I-A, before the CFO, Vandalia was producing more coal energy than it could use. Therefore, by requiring the generators to produce 50 percent more than their current rate, the PSC is forcing the generators into interstate market. Further the subsidy in contingent upon the energy selling and it is directly tied to the market price of the PJM. Because the law indirectly mandates interstate sales, it interferes with FERC’s exclusive jurisdiction over the interstate wholesale market and should, therefore, be preempted.

The *Hughes* case is the clearest and most appropriate precedent for the court to follow when considering the CFO. Defendant’s arguments that the court should rely on recent holdings that allow subsidized nuclear plants through a zero emission credits (ZEC) program are misguided. The court should not adopt this position for two reasons. First, the court in *Hughes* already addressed this line of thinking and disregarded it under using circumstances like the CFO. The precedent for *Zibelman*, which allowed the ZEC program to continue, is *N.W. C. Pipeline Corp*. 906 F.3d at 53-54. *N.W. Pipeline* affirmed that states may enact laws that are within the field designated to them by Congress even if the laws effect the wholesale interstate energy market. 489 U.S. at 512. However, a state is not allowed “to influence the purchasing decisions of interstate [markets].” *Id.* at 518; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (State not permitted to regulate pipelines’ purchasing decisions even though the state purpose was to regulate production).

Hughes, while considering *N.W. C. Pipeline Corp*., expressly says that a state is not allowed to regulate a domain Congress assigned to the FERC and FERC is not required to accommodate an interfering state law if its purpose is to intrude in the market. 578 U.S. at 164 n.11. The CFO meets both criteria. PSC sought to disregard the interstate wholesale price and influence market participants choices in purchasing energy. Because of this, the CFO beyond the limits set in *N.W. Pipeline* and *Hughes* and does not fall within the exception. The CFO should be considered using *Hughes,* who found these same practices unconstitutional.

Second, the features the second circuit lists that make the ZEC program “untethered” to the wholesale market are not applicable to the CFO. They are: whether the subsidy requires market participation, whether the subsidy is tied to the wholesale rates, and whether the FERC has jurisdiction of the market being subsidized. *Zibelman*, 906 F3d at 51. To the first point, the CFO requires interstate market participation as addressed above. Next, The CFO subsidy is directly tied to the wholesale rates. The order explicitly says that the rate of the subsidy will vary with the market clearing price of the PJM auction. Finally, the CFO also directly impacts the PJM auction which is the exclusive jurisdiction of the FERC. Applying the *Zibelman* line of cases would enforce a misreading of that case and contradict the reasoning within it. The court should rather rely on *Hughes* in considering the CFO’s constitutionality.

B. The Capacity Factor Order is conflict preempted because it would result in severe damage to the federal goals laid out in the FPA.

The CFO interferes with Congress’ goal in creating a just and reasonable wholesale energy rate because it will seriously distort the PJM’s sole market setting device that ensures a just and reasonable wholesale rate. A state law may be conflict preempted when it is an obstacle to the full "purposes and objectives of Congress" or "interferes with the method" designed to achieve their goal. *Zibelman*, 906 F3d at 55. However, because states have prescribed jurisdiction over sections of the energy market, courts must analyze conflict preemption claims "sensitively" to not diminish the role Congress gave to the states. *Id.* Therefore, a state law is preempted if it results in "clear damage to the federal goal", regardless of whether it is within the state's power to regulate production. *N.W. C. Pipeline Corp*, 489 U.S. at 522.

The goal of the FPA is to ensure that the "rates and charges" subject to the interstate wholesale market under the jurisdiction of the FERC are "just and reasonable." *See* 16. U.S.C. §§824d(a), 824(b). Also, the PJM auction is "the sole rate setting mechanism" for energy sales and the market clearing price is "per se just and reasonable." *Hughes*, 578 U.S. at 151.

Putting it together, a state law is conflict preempted by the FPA if it results in clear damage to either the just and reasonable rates in the wholesale market or the PJM energy auction. Clear damage to the FPA results when a state program has a more than incidental effect on the PJM auction or the FERC's goals. *See id.*; *Klee*, 861 F.3d at 101; *Zibelman*, 906 F3d at 57.

The CFO results in clear damage to the wholesale market because it sets the wholesale rate for Vandalia's coal-fired generators and ensures their participation in energy auction. First, the generator subsidy provision directly damages the interstate wholesale rate. As discussed previously, the subsidy for coal-based generators sets their wholesale rates. FirstEnergy and MAPCo can become price takers and bid their energy at zero. They then sell their energy at the market clearing price and Vandalia ratepayers cover any difference. This exempts them from the pressures of the market and ensures that their sale rate is neither just nor reasonable. Similarly, the subsidy distorts the market clearing price and makes it neither just nor reasonable. The subsidized generators, by bidding their energy for nothing, drive the market clearing price down. Therefore, all non-Vandalian coal fired generators participating in the market earn less for their energy and could be excluded from the auction due to the CFO. By directly distorting the per se just and reasonable market price, the price is no longer just nor reasonable.

Second, the CFO, through mandating increased capacity, exacerbates the subsidy's effect. As discussed above, by mandating that generators produce more energy than the state needs, the CFO ensures that the coal-fired generators participate in the interstate market. From that point the FRR dictates that the sell into the PJM. However, as discussed in argument I-A, even without the FRR, the statute ensures that the PJM auction is the only sale that the generators could pursue. By being subject to a reasonableness review, the CFO generators could only enter into bilateral contracts where they sell their energy for the cost of production. Because Vandalia coal is more expensive than other sources on the market, the CFO generators will need to enter the auction as price-takers.

The CFO's effect on the PJM will be acute. While only operating at an average capacity rate of 50 percent, Vandalia is among the top five states in interstate transfers of electricity. Coal accounted for 91 percent of Vandalia's total electricity net generation in 2021. By increasing their coal production by 50 percent, the effects on the PJM market will be drastic. This is especially true considering the national decline in the coal industry and the predictions of both MAPCo and LastEnergy that coal is becoming even more expensive with the development of cheaper sources of energy. The direct interference of the CFO in setting wholesale rates as well as the provisions that exacerbate those effects more than incidentally effect the PJM auction. Because of this, the CFO clearly damages the government's goal of setting just and reasonably wholesale rates and FERC's chosen method to achieve those goals. Therefore, the CFO is conflict preempted by the FPA.

III. VANDALIA'S STATUTORY ROFR VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUION BECAUSE IT IS PREEMPTED BY FERC ORDER 1000

A fundamental principle of the Constitution is that Congress has the power to preempt state law. *California v. ARC Am. Corp.*, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989). Courts have found that state law must yield to a congressionally mandated Act in at least two circumstances: when Congress intends federal law to "occupy the field," state law in that area is preempted. *Id*., at 100, 109 S.Ct. 1661. State law is naturally preempted in cases when it conflicts with a federal statue, regarldess if Congress has occupied the field or not. *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). In this case, Order 1000 directly prohibited ROFRs. State ROFR laws, including Vandalia's, therefore, directly target that directive by jeopardizing the construction of transmission projects selected in an Order 1000 competitive market. Thus, because such targeting nullifies the FERC-set rate, it is preempted.

To survive a motion to dismiss, ACES need only assert that Vandalia's ROFR is plausibly preempted by Order 1000. *Iqbal*, 556 U.S. at 679.

A. Order 1000 directly prohibited ROFRs

For three decades, the FERC aimed to implement policies that promote competition in the wholesale electricity market. Mandated under the Federal Powers Act, their goal was to ensure that rates charged by wholesalers are just and reasonable. In order to do so, the competitiveness of the market must be regulated. In 1996, the FERC issued Order 888, which required transmission owning utilities to provide open and non-discriminatory access to their transmission lines, "thereby removing impediments to competition in the wholesale bulk power marketplace and enabling more efficient, lower-cost power to be delivered to electricity consumers."

In a similar effort to remove impediments to competition, the FERC issued Order 1000, which required ISOs to eliminate ROFR provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects to be competitively and regionally planned by entities like PJM. Prior to Order 1000, many FERC-approved ISO tariffs included ROFR provisions–allowing incumbent transmission owners the sole right to construct and maintain new transmission lines in their area. Even if a nonincumbent transmission owner submitted a proposal for a new facility to the ISO and could construct a new facility more efficiently than the incumbent, the ROFR could still apply. In issuing Order 1000, the FERC understood that ROFRs inhibited competition and created the potential for higher costs and less efficient use of transmission facilities–thereby increasing costs for consumers.

B. Vandalia's ROFR law directly targets the federally issued Order 1000.

In response to Order 1000, Vandalia's legislature passed the Native Transmission Protection Act, which granted incumbent transmission owners the exclusive right to construct and maintain transmission lines. In addition, as PSC contends, this ROFR expires after 18 months. Nevertheless, this law directly aims to nullify FERC's federal directive and restore their ROFR. This was no better exemplified when analyzing the statements of the Senator who introduced this bill–describing it as a direct response to Order 1000 and its elimination of "a federally recognized right of first refusal."

FERC's actions are mandated under the Federal Power Act, which was enacted by Congress. Where state law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives," courts have implied conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). By directly aiming to nullify a federally issued mandate, Vandalia's ROFR is preempted.

IV. VANDALIA'S ROFR VIOLATES THE DORMANT COMMERCE CLAUSE

The United States District Court for the Eastern District of Vandalia incorrectly held that Vandalia's ROFR law did not violate the dormant Commerce Clause. The framers of the Constitution ensured that the Congress had the "Power … [t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. While this provision does not specifically mention state action over interstate commerce, the text plainly articulates that because the legislative branch has authority to regulate interstate commerce, states cannot adopt policies that aim to discriminate against or overly burden that commerce. "This 'negative' aspect" of that power, also called the dormant Commerce Clause, "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 204 L. Ed. 2d 801, 139 S. Ct. 2449, 2459 (2019) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)).

To survive a motion to dismiss ACES need only assert that Vandalia's ROFR plausibly violates the dormant commerce clause. *Iqbal*, 556 U.S. at 679.

A. On its face, the Native Transmission Protection Act unconstitutionally discriminates against out-of-state providers.

The Native Transmission Protection Act facially discriminates against interstate commerce with an in-state presence requirement: a company may only build a transmission line in Vandalia if it already "owns, operates, and maintains an electric transmission line in this state." Vand. Code § 24-12.3(d). If such an incumbent electric transmission owner fails to exercise that right within eighteen 18 months, another entity may build the electric transmission line. *Id*. Courts have well established that such laws that possess this "in-state" requirement is unconstitutional under the dormant Commerce Clause. *Tenn. Wine & Spirits*, 139 S. Ct. at 2457 (holding that an in-state residency requirement that "blatantly favors the State's residents" is unconstitutional); *Granholm v. Heald*, 544 U.S. 460, 474–75, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (holding that a state law requiring in-state presence to ship wine directly to consumers is unconstitutional).

Further, Vandalia's ROFR directly controls an instrument of interstate commerce by restricting the production of transmission lines that facilitate the movement of vast pools of interstate electricity throughout the various states in PJM. While the law regulates only the construction and operation of transmission lines and facilities within Vandalia, because the entire state of Vandalia is included in PJM Interconnection—the interstate electricity network that services numerous states in the mid-Atlantic region—new lines constructed in the state are thus vehicles of interstate commerce that provide electricity across multiple states in the mid-Atlantic region. Regardless if transmission lines are contracted exclusively in a state, "any electricity that enters the grid immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce." *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022) (quoting *New York v. FERC*, 535 U.S. 1, 7, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002)). Vandalia's new transmission lines cannot and do not serve Vandalia consumers alone. As articulated in the case of *Southern Pacific Co. v. Arizona ex rel. Sullivan*, "[T]ransmission 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 patently interfere with broader national interests.". *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Com'n*, 461 U.S. 375, 377 (1983).

B. Through its effects, the Native Transmission Protection Act unconstitutionally discriminates against out-of-state providers.

Even if a state statute appears neutral, it can still be in violation of the dormant Commerce Clause if it favors in-state businesses. *Lewis v. BT Inv. Managers, Inc*., 447 U.S. 27, 36-37 (1980). The effect of Vandlia's ROFR law is apparent: while incumbent business' exclusive right expires after 18 months, it allows electric transmission owners the right to contract, buy, own, or maintain transmission lines, but only if they already own an existing facility in Vandalia. Further, an 18-month ROFR is so extensive that it prevents any new entrants into the market because of the uncertainty and additional risk associated with a proposed transmission project–hindering the ability to secure the necessary financing for such a massive construction project. Under the state law as written, unless out-of-state providers acquire an existing incumbent transmission owner in Vandalia or wait 18 months, incumbent businesses have exclusive rights to these markets.

Vandalia's ROFR law distinguishes favored providers solely on the basis of their ownership of in-state facilities. PSC argues that because most of the providers in Vandalia are owned by out-of-state companies, the ROFR is less egregious than similar ROFR laws enacted in other states. While the district court reasoned that the place of incorporation controlled, in finding dormant Commerce Clause violations, the Supreme Court never once mentions the place of incorporation for cases where establishments received unlawful benefits because of their local presents. *Brown-Forman v. N.Y. State Liq. Auth.*, 476 U.S. 573 (1986) (holding unconstitutional a state statute that prohibited distillers from selling liquor to in-state wholesalers at a price higher than the lowest price the distiller charged to out-of-state wholesalers); *Granholm* 544 U.S. at 465-66 (holding unconstitutional state laws that permitted wineries with an in-state presence to export wine to state residents).

Most circuit courts have rejected the idea that a law survives Commerce Clause scrutiny if many of the favored entities are incorporated elsewhere. As the Eleventh Circuit explained, if "place of incorporation alone" were controlling, "then a state['s] dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012). The court explained that while some incumbents "were incorporated out-of-state, all of the [incumbents] were operating locally at the Port or were otherwise entrenched at the Port." *Id.* So too here: while the incumbents favored by Vandalia's Native Transmission Protection Act are incorporated elsewhere, all incumbents are operating locally in Vandalia*.* As such, entities without Vandalia operations are largley excluded from the market.

This reasoning relates to what the Supreme Court has recognized as a primary concern of the dormant Commerce Clause: "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, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). Considering that Supreme Court precedent, the majority view of courts of appeals is that where a company is "based" is not controlling, and a law can discriminate against interstate commerce even though most of the incumbent transmission-line providers that benefit from Vandalia's ROFR legislation are incorporated or headquartered outside Vandalia.

C. Vandalia's ROFR law was created with the purpose of discriminating against out-of-state businesses.

Courts consider certain factors when determining discriminatory purposes. Included in these factors are: (1) whether the effect of the state action creates a clear pattern of discrimination; and (2) the historical background of the action, which may include any history of discrimination by the decisionmakers. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Here, ACES has numerous allegations for these factors.

First, the effect of the state action creates an apparent pattern of discrimination. As discussed, the law's purpose and effect were to prevent out-of-state businesses from building transmission lines in Vandalia. Vand. Code § 24-12.3(d). These provisions show a clear effort to discriminate. This is exemplified in *SDDS, Inc. v. State of S.D.*, where the Eighth Circuit found that a state initiative was specifically designed to hinder the importation of out-of-state waste. *SDDS, Inc. v. State of S.D.*, 47 F.3d 263, 268 (8th Cir. 1995).

Second, the historical background of the Native Transmission Protection Act, including the sequence of events leading to its passage, evidences discriminatory purpose. As discussed, the Native Transmission Protection Act was passed in response to Order 1000, the FERC issued mandate which required the elimination of ROFR provisions in FERC-approved tariffs and agreements. Prior to Order 1000, ISO tariffs contained ROFR provisions, giving owners of existing transmission lines the exclusive right to build and maintain new facilities in their areas. Essentially, this allowed incumbent businesses to wait for nonincumbent entities to identify promising opportunities and then utilize their ROFR to take those opportunities and construct their own lines. As noted above, the elected official who introduced the bill made clear that this was a direct response to Order 1000 by stating that it was restoring "a federally recognized right of first refusal." In addition, a representative from LastEnergy, the largest incumbent transmission line owner in Vandalia, testified in support of the bill and argued that it was necessary to restore the "status quo" from before Order 1000. It does not take a legal expert to see that Vandalia's ROFR, from its inception, was created to directly conflict with a federal directive and discriminate against out of state entities from entering Vandlia's local market.

D. The burden imposed by Vandalia's ROFR is "clearly excessive in relation to the putative local benefits."

Even if a law on its face does not directly discriminate, it can still be deemed unconstitutional if it creates burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The district court's dismissal of the allegations involved in the Pike balancing test, which determines whether the burden on interstate commerce outweighs the local benefits to the state, ignores persuasive views and misinterprets the Pike test.

ACES does not currently have transmission facilities in Vandalia. Instead, ACES would have to acquire one of the two retail entities currently servicing the state, LastEnergy and Mid-Atlantic Power Co. ("MAPCo"), to enter the market. An acquisition of this magnitude could take a significant amount of time, create unreasonable expenditures, and further hinder opportunities for customers to benefit from reliable, affordable electricity.

This burden does not fall solely on ACES, but on the entire transmission system. For one, consumers throughout PJM would have paid for (and benefited from) the Mountaineer Express. Moreover, as FERC has explained, without competition for transmission lines, there is little incentive to identify and build new, important interstate lines. By approving ACES's Mountaineer Express project in March of 2022, PJM aimed "to encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system."

Further, in assessing burden, courts also examine "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). If every State adopted a law like Vandalia's ROFR, it would lay waste to FERC's efforts to diminish federal rights of first refusal and reduce competition in the transmission market. Every nonincumbent entity would be forced to purchase a business to participate in the market. Such a burdensome and unnecessary requirement, if made necessary because of the imposition of restrictions PSC seeks to impose, would materially fracture nonincumbent business models and "impose an artificial rigidity on the economic pattern of the industry." *Pike*, 397 U.S. at 146.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the United States District Court for the District of Vandalia. The court should hold that ACES has standing to challenge the CFO, that ACES has met their plausibility burden on all claims, and remand to the District Court for further proceedings.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing ACES 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. 34