C.A. No. 22-0682

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

CHAIRMAN WILL WILLIAMSON, *in his official capacity*,

COMMISSIONER LONNIE LOGAN, *in his official capacity*, and

COMMISSIONER EVELYN ELKINS, *in her official capacity*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF VANDALIA

BRIEF OF APPELLEES

CHAIRMAN WILL WILLIAMSON, *in his official capacity*,

COMMISSIONER LONNIE LOGAN, *in his official capacity*, and

COMMISSIONER EVELYN ELKINS, *in her official capacity*,

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I. JURISDICTIONAL STATEMENT

This action originated in the United States District Court for the Northern District of Vandalia. On June 6, 2022 the appellant Appalachian Clean Energy Solutions, Inc. ("ACES") brought suit alleging that the Vandalia Public Service Commission ("PSC") had violated the Constitution. ACES brought claims under the United States Constitution, asserting that the PSC and Native Transmission Act had violated the Constitution's Commerce Clause (U.S. Const. art. I cl. 8) and Supremacy Clause (U.S. Const. art. VI cl. 2). The District Court had subject matter jurisdiction under 28 U.S.C. § 1331.

On August 15, 2022, the District Court granted the PSC's motion to dismiss ACES's claim. The judgment was entered the same day, ACES timely filed this appeal on August 29, 2022, this Court has jurisdiction because this is an appeal from a final judgment of the United States District Court, 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED

1. Whether ACES has standing to challenge the PSC's Capacity Factor Order when it has no articulable injury nor causal connection to the injury itself?

2. Whether the PSC's Capacity Factor Order violates the Supremacy Clause of the US Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission under the FPA when the order is not tethered to the wholesale market and is entirely within Vandalia's retained jurisdiction?

3. Whether the Native Transmission Act violates the Supremacy Clause when both Congress and FERC have approved of similar language for state rights of first refusal?

4. Whether the Native Transmission Act violates the Dormant Commerce Clause when it is not overly burdensome or restrictive on interstate commerce, does not prohibit out of state competition or entrance into the market and is not facially discriminatory?

III. STATEMENT OF THE CASE

ACES filed this action on June 6, 2022, after the Vandalia PSC had created the Capacity Factor Order which required coal fueled power plants within Vandalia to operate at 75% capacity. (Record "R." page "pg." 8, 14.) ACES also brought suit in relation to the Native Transmission Protection Act which created a state Right of First Refusal for "incumbent electric transmission owners" within Vandalia. (R. pg. 15.) ACES the corporation bringing these claims is the largest independent electricity transmission company in the United States and a Global Energy Corporation. (R. pg. 4, 5.) ACES claims that the Capacity Factor Order will set the whole sale rates in PJM the Independent System Operator which services the area. (R. pg. 14.) ACES also claims that the Native Transmission Protection Act and the Right of First Refusal within bring speculative doubt as to how the Mountaineer Express can be built. (R. pg. 11.)

The Vandalia PSC was created to regulate the rates and practices of utilities providing retail service within the state of Vandalia. (R. pg. 6.) The PSC has a broad amount of authority, their primary duties being to make sure that the citizens of Vandalia receive just and reasonable rates from utilities subject to Vandalia jurisdiction. (R. pg. 6.) The Legislature further enacted specific directives to the PSC to ensure that coal, the lifeblood of Vandalia, was the dominant source of energy within the state (R. pg. 6.) Coal historically has been the main energy source within Vandalia and remains one of the dominant energy forms within the state. (R. pg. 4.) In 2021 Vandalia was the number three coal producer in the nation, coal fired power plants

accounted for ninety one percent of Vandalia's total electricity net generation in 2021. (R. pg. 4.) Coal is still the king in Vandalia and thus crucial to the economy of the state an interest that the PSC is tasked with protecting. (R. pg. 4, 6.)

The PSC in response to their duties promulgated the Capacity Factor Order, which in effect ordered LastEnergy and MAPCo, two incumbent public utilities, to operate their coal fired power plants within Vandalia at no less than seventy fire percent capacity. (R. pg. 8.) The PSC made a factual determination that the operation of the plants at seventy five percent would be economical. (R. pg. 8.) LastEnergy and MAPCo, are the two retail utilities that service Vandalia both are headquartered and incorporated outside of the Vandalia. (R. pg. 4.) LastEnergy has two coal-fired power plants within Vandalia, MAPCo has three that operate within Vandalia. (R. pg. 4.) ACES does not have any facilities that operate within Vandalia which in effect means that the Capacity Factor Order does not apply to them. (R. pg. 5.)

The Vandalia legislature also passed the Native Transmission Protection Act in May, of 2014. (R. pg. 9.) The act was created in response to FERC Order 1000 an order eliminating **ONLY** a federal Right of First Refusal. (R. pg. 9.) The order however recognizes that the states retain jurisdiction over many things including transmission lines within their states. (R. pg. 13.) The act contained within it a state Right of First Refusal which allowed for the incumbent transmission owners of the state to have priority in building new lines within Vandalia. (R. pg. 9.) Nothing within the statute bars new entrants into the market, it simply creates a preference for those who have served Vandalia before, and use Vandalia coal. (R. pg. 9, 10.)

ACES brought suit on June 6, 2022, alleging three challenges to the district court. (R. pg. 14, 15.) The first and second alleged that the constitutionality of the CFO and the Native Transmission Protection Act was questionable based on the Supremacy Clause. (R. pg. 14, 15.)

The last challenged the constitutionality of the Native Transmission Protection Act based on the Dormant Commerce Clause. (R. pg. 15.) The PSC asked the District Court to dismiss all the frivolous claims against the Capacity Factor Order and the Native Transmission Protection Act on June 27, 2022, and the district court granted the motion to dismiss on August 15, 2022. (R. pg. 14,15). ACES appealed to this Court on August 29, 2022. (R. pg. 15).

IV. SUMMARY OF THE ARGUMENT

ACES is a global out-of-state entity that is worried about its success in the market. It does not have standing to challenge the PSC's Capacity Factor Order ("CFO") because they have not met the elemental requirements of constitutional standing. The three necessary elements of standing are: injury, causation, and redressability. Despite the finding of fact that the CFO would be economical, the hypothetical injury ACES alleges is competition in the market. This hypothetical is just that: hypothetical. In order to have standing, the injury must be in fact whether imminent or actual. ACES here has none. Even if ACES articulated an injury in fact, there is no direct causal link or traceability to the CFO within Vandalia. The lower court was correct in determining that ACES does not have standing. This is a giant, out-of-state corporation picking a fight small state agency that is legally protecting jobs and livelihoods in an economical way.

The CFO is not a violation of the Supremacy Clause of the US Constitution because it is not preempted by FERC or the FPA and is entirely within the Vandalia's explicit jurisdiction. The duty tasked to FERC by the FPA requires that they set just and reasonable rates on the wholesale market of electricity. Within the language of the statute that delegates this power, the rights reserved to the states are also explicitly stated. Intrastate power generation is one of the

reserved rights, and the CFO operates within those confines. The CFO does not set rates as is prohibited by FERC, it merely increases the capacity operation from 45% to 75%. The controlling case law also provides that incentives to prioritize energy production from specific sources, as the CFO does, are legal as long as they are untethered from the wholesale market. Vandalia's CFO protects the interests of the state in that it promotes the longevity of the coal industry, which has a long history within the state and provides for the citizens throughout the entire process of its consumption. The lower court was right in determining through the ZEC analysis that the CFO is not preempted by federal law.

The heart of the issue in relation to the Native Transmission Protection Act and the Right of First Refusal is where does the trampling of state sovereignty end. Ultimately this action is about a global energy producer trying to make Vandalia a small state comply with them because of their monetary interest. Yet Vandalia and all states retain a large amount of jurisdiction about the land within their state and who may build within their state. FERC and Congress have both recognized these rights to be true, that is why Order 1000 has many provisions which proclaim the states have exclusive jurisdiction over the construction of and permitting of transmission lines within their state. Therefore, when FERC and Congress have both recognized that states have a vested interest in determining who builds what within their state then it is very likely that the Native Transmission Protection Act is not preempted here.

As to ACES second claim about the Native Transmission Protection Act and the Dormant Commerce Clause. The lower court and other courts have all recognized that incorporation can be a controlling factor for the Dormant Commerce Clause analysis, ACES is incorporated in Vandalia. Making ACES discrimination claim all but dead on arrival as its been recognized that when incorporated in a state the amount of evidence needed to show discrimination grows

drastically. There is also clear precedent that a preference equally applied to everyone does not rise to the level of discrimination facially, or in effect. As to the possibility of a discriminatory purpose courts have also made it clear the threshold needed to show that purpose is more than a few words of support from third parties and a lone senator. For all of these reasons there is no discriminatory violation of the Dormant Commerce Clause. As to the burden on interstate commerce clearly outweighing the local benefits, it is painfully obvious that Vandalia's benefit is superior. This statute allows for companies who are incumbents to have the first chance at building new lines, those same companies are ones who buy coal from Vandalia and then use it to provide energy. It is very apparent that the benefits of this are weighed heavily for Vandalia because coal is their economy and this provision allows for more lines to be built by companies who use coal.

V. ARGUMENT

A. The Standard of Review.

Regarding the PSC's Capacity Factor Order, this court must review legal questions decided by the district court involving standing and the Supremacy Clause de novo, viewing any facts in the light most favorable to ACES. Regarding the NTPA, this court must also review the legal questions decided by the district court involving the Supremacy and the Dormant Commerce Clause de novo.

B. ACES lacks standing because there is no injury in fact, no direct causal link to the Capacity Factor Order, and therefore no adequate redressability through the Court.

ACES does not have standing to challenge the Vandalia PSC's Capacity Factor Order (CFO). The Constitutional justiciability doctrine of standing has three distinct elements. In order for the Plaintiff here to have standing to challenge the PSC's CFO, they must show that they

have been injured, that the injury is causally connected to the CFO, and that the court is able to redress the harm. ACES has not established an injury whatsoever. Even if this Court were to determine that ACES has been injured in fact, there is no indication of any causal link to the CFO that could injure ACES. Without injury or causal link, there is no redressability. The trial court below was correct in determining that ACES simply does not have standing in the instant case.

1. ACES has not articulated an injury.

Appellants must demonstrate an injury; they have not done so. The injury must be an injury *in fact*, meaning the cause of action must be "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). ACES purports that by simply impacting the market, the CFO therefore injures them. This conclusion is entirely speculative and does not rise to the burden required by the appellants to demonstrate that they have been injured *in fact.*

The CFO is an attempt to promote and protect the burning of coal within the state of Vandalia. By operating at 75% capacity instead of 45%, there could potentially be a surplus of energy in the PJM market due to the contractual obligation MAPCo and LastEnergy have that requires them to sell energy to PJM. (R. pg. 15.) The CFO requires the ratepayers to cover the difference in the event these plants do not make the market clearing price (MCP). (R. pg. 8.) ACES buys their energy from PJM which is fed from several other states including Vandalia. (R. pg. 3, 4.) The only conceivable injury ACES could propose would be an impact to the capacity market. This is entirely speculative. There is no way to determine what impact this will have on the market and how that impact will affect ACES; simply having an impact at all does not rise to

proving injury. ACES may argue that there is injury, however, under the competitor market theory. This theory though, is distinguishable from the facts in the instant case. Within the competitor market theory, the injury is only applicable when competition is introduced to the market through new businesses or entities. No new businesses, entities, or plants are being introduced to the market with the CFO. The scope of inquiry is limited to the plants within Vandalia increasing their operating capacity by 30%.

2. ACES has not defined a causal connection between their hypothetical injury and the Capacity Factor Order, and there is no redressable action available to the Court.

ACES has not articulated an actual harm or injury to them from the CFO; neither a present injury nor an imminent injury. The Vandalia Public Service Commission does not concede an injury, but even if there were an articulable injury to ACES, it would not be traceable directly to the CFO within Vandalia. This element, along with the other two (injury and redressability) are required to meet the constitutional requirements of standing.

The capacity market works by individual plants selling their electricity into PJM, and buying it back to distribute to consumers. Multiple states, including Vandalia, sell their electricity into both markets within PJM. As explained in the record, Vandalia already exports more electricity from its coal plants than most other states. ACES already has to compete with one of the biggest exporters of coal-generated electricity. That electricity is pooled with all of the other generators of electricity within PJM's region. The coal fired plants in Vandalia still have to clear the market price at auction. The hypothetical injury ACES is posing is still not traceable to the CFO because the hypothetical injury itself is competition.

ACES has neither established an injury it has suffered as a result of Vandalia's CFO, nor is there a causal link to the hypothetical injury alleged. These elements are required to reach the

Constitutional minimum of standing. The trial court was correct in determining that ACES does not have standing.

C. PSC's Capacity Factor Order Does Not Violate the Supremacy Clause of the US Constitution Because it is Not Preempted by the Actions of FERC.

Even if ACES has standing to assert their claim, the CFO still does not violate the Supremacy Clause. The CFO is not tethered to the wholesale market, and is within Vandalia's jurisdiction as outlined in the FPA and case law. The individual right of states to oversee intrastate power generation is reserved to them and is outside of FERC's jurisdiction.

1. Vandalia's CFO is entirely legal because it does not set wholesale rates, as is necessary to be compliant with FERC.

ACES argues that the Vandalia PSC has violated FERC's jurisdiction by implementing the CFO because it effectively sets wholesale rates. ACES is incorrect. Vandalia has exclusive jurisdiction over the generation of power within its state. The jurisdiction ACES is alleging has been infringed is that of selling wholesale rates, which the CFO simply does not do.

The CFO does not set rates. The Constitution is the Supreme law of the land, and federal laws preempt the laws of the states. U.S. Const. art. VI, Cl 2. FERC derives its power from the FPA which charges it with the duty to "regulate interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce." (R. at pg. 13); 16 U.S.C. § 824(b)(1). The language of the statute maintains that it is the states, however, that retain jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce. *Id.* FERC is also required to determine whether the set rates are "just and reasonable", and, if they are not, FERC must "rectify the problem: it then shall determine what is 'just and reasonable' and impose the 'same by order.'" *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016), quoting 16 U.S.C. § 824(e)(a). The CFO implemented by the Vandalia

PSC does not set wholesale rates and therefore is not preempted by FERC. The CFO is simple in that it provides that the coal plants within the state boundaries will operate at 75% capacity. The plants themselves are not incentivized or otherwise benefited from the CFO except in the event they do not make the market clearing price. That "incentive" is that the difference must be paid by the ratepayers and not the state. While this may seem unwise or potentially even harmful to ratepayers, this legislation is legal and protects the interests of Vandalia (including its ratepayers) by promoting the continued operation of coal plants within the state. In the event the market is altered in a way that would be unjust or unreasonable, it is FERC's duty, not ACES, to determine.

This kind of legislation promoting the increased supply of power is not unfounded, as explained in the "ZEC" line of cases. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018). As the trial court concluded below, the facts of the aforementioned cases are much more applicable to the facts of this case. (R. at pg. 15.) Under this analysis, the CFO is itself "untethered" from the wholesale market and therefore entirely within the legal requirements of the FPA and is not preempted.

D. The Supremacy Clause is not triggered by the Native Transmission Act because, Order 1000 only eliminated the federal right of first refusal, not the states and Congress and FERC have both approved of the state right of first refusal.

The Supremacy Clause is violated when the state regulation or rule in question is some of conflict with a federal statute. These conflicts can be broken down into two categories express and implied preemption. Neither is present here as Vandalia is acting within its state jurisdiction. Order 1000 only limited the federal right of first refusal while states still retained a great portion of their power. FERC has recognized this time and again, FERC has also recognized that states

have the right to implement a right of first refusal. Congress has also recognized that same right as well.

1. The Supremacy Clause does not expressly preempt the Native Transmission Protection Act because FERC Order 1000 was designed to work with states and the jurisdiction they retained.

The Native Transmission Protection Act is not expressly preempted by FERC Order 1000, because the order, FERC, and Congress all recognize that states retain jurisdiction within their state boundaries.

"There is an assumption that the historic police powers of the states are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

FERC Order 1000 was created to allow for the entrance of new transmission developers within ISOs like PJM. (R. pg. 14.) The order effectively removed the federal Right of First Refusal for the most part. (R. pg. 14.) But it's worth noting that it did not remove the federal Right of First Refusal entirely:

> In addition, the Proposed Rule emphasized that our reforms do not affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities, such as in the case of tower change outs or reconductoring, regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation. In other words, an incumbent transmission provider would be permitted to maintain a federal right of first refusal for upgrades to its own transmission facilities.

18 C.F.R. § 35 (2011). Order 1000 clearly did not fully eliminate a Right of First Refusal in some circumstances at the federal level. *Id.* Even more interesting is the fact that the same portion of the order that stated the above also stated this "nor does this Final Rule grant or deny transmission developers the ability to use rights-of-way held by other entities, even if transmission facilities associated with such upgrades or uses of existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation." *Id.* Further stating that the right "[t]he retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way." *Id.* So within one section of Order 1000 FERC has recognized that Right of First Refusals are workable within ISOs, and that states retain jurisdiction within their state in many respects.

For further confirmation that Right of First Refusals can function within ISO tariffs, look at the various states with similar statutes to Vandalia. There are four states with similar statutes that still stand, and one that had a Right of First Refusal but was struck down. Those four states with still standing statutes being Minnesota, Oklahoma, North Dakota, and South Dakota. Minn. Stat. § 216B.246 (2022); Okla. Stat. tit. 17, § 292 (2022); N.D. Cent. Code § 49-03-02 (2022);

S.D. Codified Laws § 49-32-20 (2022). The language of these statutes all closely mirror that of the Vandalia language and these statutes have all stood since Order 1000 as well.

The Minnesota statute has faced several challenges while not on preemption grounds, the court took time to address where their authority came from. The first instance being in which FPA, and FERC recognize that "States retain jurisdiction over the retail sale of electric energy, as well as the 'local distribution' and 'transmission of electric energy in intrastate commerce.'" *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp. 3d 695, 700 (D. Minn. 2018). The court further pointed out that "Order 1000 recognized that states could continue to regulate electric transmission lines. (Order 1000 ¶ 107)" *Id.* at 701. Yet, the court goes further in this dive, "We acknowledge that there is longstanding state authority of certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority." *Id.*

The court felt that clearly it was important to draw out how Minnesota was able to pass their Right of First Refusal statute as it further pointed out what FERC had said. "However, we note that nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id.* The court clearly felt the importance of showing that FERC had given the stamp of approval to the Right of First Refusal as it also pointed out, "FERC approved MISO's tariff, and in particular its decision to honor the state ROFR laws." *Id.* at 702. The court pointed out two final things of importance for this issue, First that FERC proclaimed Order 1000 struck an important balance between removing participation barriers and preserving state sovereignty. *Id.* Secondly the court stated affirmatively "that Order

1000 terminated the federal, not any state, right of first refusal[] 'Order No. 1000 terminated only federal rights of first refusal; it did not limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'" *Id.* at 702, 703.

When viewing all discussed above in the totality of the circumstances, it is quite clear that the Native Transmission Protection Act is not expressly preempted by Order 1000. FERC and Congress both have "expressly indicated that Minnesota is entitled to make the policy decision to adopt a right of first refusal to build new transmission lines." *Id.* at 708. FERC and Order 1000 were created to work in tandem with states and the decisions that the various states make. Throw in that the Minnesota language which has been challenged and survived mirrors that of Vandalia shows that there is no express preemption. The only difference between the two is the time periods Vandalia's is longer than Minnesota's.

Therefore, due to the nature of Order 1000 and the express approval of Congress and FERC the Native Transmission Protection Act is not expressly preempted.

2. The Supremacy Clause is not violated because the Right of First Refusal does not frustrate the purpose of Order 1000.

The Native Transmission Protection Act survives implied preemption under the frustration of purpose test because, it does not prevent new entrants into the market which is why Order 1000 was created.

"[T]he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute." *Rice*, 331 U.S. 218, 230 (U.S. 1947).

As mentioned above the ultimate purpose of Order 1000 was to allow for the entrance of new transmission developers within ISOs like PJM. (R. pg. 14.) The statute within Vandalia like the one within Minnesota allows for new entrants provided they wait the allotted time or buy an existing company to become an incumbent owner. (R. pg. 9.); Minn. Stat. § 216B.246 (2022). Meaning that the purpose of Order 1000 is clearly not frustrated by the Native Transmission Protection Act, as FERC has recognized the balance between their power and that of the states. *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp. 3d 695, 702, 703 (D. Minn. 2018).

Therefore, because new entrants can find a way into the Vandalia market the purpose of Order 1000 is clearly not frustrated.

E. The Dormant Commerce Clause is not violated by the Native Transmission Protection Act because, the act is not facially discriminatory, nor is it overly burdensome on interstate commerce.

The Dormant Commerce Clause is violated when the state regulation in question is overtly discriminatory against out of staters and provides residents with benefits. The Dormant Commerce Clause can also be violated when the effect or purpose of the law is an overly excessive burden on interstate commerce not outweighed by the by the local benefits. The Native Transmission Protection Act does not discriminate against ACES, as ACES is headquartered in Vandalia, various courts including the lower court held that the state of incorporation controls this analysis. Even if this Court were to look past that the Native Transmission Protection Act does not prevent ACES from entering the market. The minor burden on interstate commerce is clearly outweighed by the local benefits to Vandalia.

1. **The Dormant Commerce Clause is not violated because the Native Transmission Protection Act is not overtly discriminatory against ACES as ACES is incorporated in Vandalia nor in any other fashion.**

The Native Transmission Protection Act is not overtly discriminatory against ACES in any fashion. Because the corporation is incorporated here within Vandalia, and nothing is preventing ACES from entering the market.

The Dormant Commerce Clause, holds that "[]if the law in question overtly discriminates against interstate commerce, we will strike the law unless the state or locality can demonstrate, 'under rigorous scrutiny, that it has no other means to advance a legitimate local interest.'" *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000). That discrimination can come in one of three ways, facially, effect, and purpose. *Id.* Place of incorporation can be crucial in the analysis of a discrimination claim. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027-29 (8th Cir. 2020). "In determining whether a regulation has a discriminatory purpose, courts consider both direct and indirect evidence." *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste*, 433 F.3d 600, 604 (8th Cir. 2006). "A regulation discriminates in effect if it favors in-state economic interests over out-of-state interests." *Id.* at 605.

In *LSP Transmission Holdings, LLC v. Sieben*, the 8th Circuit was tasked with determining whether a Minnesota's state right of first refusal was discriminatory. F.3d 1018, 1025 (8th Cir. 2020). The court began its analysis by looking at where LSP the company was incorporated. *Id.* at 1027-29. The court held that the place of incorporation along with how the statute language treated all companies same, had effectively dismantled the argument of facial discrimination. *Id.* In another case involving LSP and the Minnesota statute, the District Court of Minnesota held that "[t]here is no dispute that the statute grants a preference to 'incumbent

electric transmission owners,' but that preference does not discriminate against out-of-state entities" *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp. 3d 695, 708 (D. Minn. 2018).

In *Sieben*, the court also analyzed the other factors of when a statute may be discriminatory such as their purpose and effect. F.3d 1018, 1029 (8th Cir. 2020). The court explained what could be examined when looking for this type of discrimination:

> This includes: 1) statements by lawmakers; 2) the sequence of events preceding the [statute]'s adoption, including irregularities in the procedures; 3) the state's consistent pattern of discriminating against, or disparately impacting, a particular class of persons; 4) the [statute]'s historical background, including whether it has been historically used to discriminate; and 5) the [statute]'s use of highly ineffective means to promote the legitimate interest asserted by the state.

LSP Transmission Holdings, LLC v. Sieben, F.3d 1018, 1029 (8th Cir. 2020). LSP claimed that the legislative history showed it had a discriminatory purpose the court however disagreed as the remarks of supporters of the bill do not show a legislative purpose. *Id.* Finally, the court discerned whether there was a discriminatory effect or not. *Id.* at 1030. The court held that there was no discriminatory effect because anyone could enter the market, and the law treated in state and out of state utilities the same. *Id.*

ACES is incorporated within Vandalia, which based upon the reasoning in *Sieben* and the lower court means that ACES can not show that it is facially discriminated against by this statute, the situation is quite comparable to that of LSP in the *Sieben* case. (R. pg. 16.); *Sieben*, F.3d 1018, 1027-29 (8th Cir. 2020). Yet even if this court were to disagree with the place of incorporation mattering, ACES still can not show facial discrimination. Because this statute like the Minnesota statute merely shows a preference but that preference applies equally and is not limited to just in

state utilities. (R. pg. 9.); *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp. 3d 695, 708 (D. Minn. 2018).

Further, ACES cannot show that the Native Transmission Protection Act has a discriminatory purpose or effect either. It is possible that ACES will point to the remark of a lone Vandalia senator and some supporters of the bill to show a discriminatory purpose. (R. pg. 9.) This would be insufficient just as it was insufficient in the *Sieben* case the remarks of supporters and a lone senator can not show that this statute has a discriminatory purpose. (R. pg. 9.); *Sieben*, F.3d 1018, 1027-29 (8th Cir. 2020). Perhaps if there had been multiple lawmakers who had suggested it then perhaps a purpose could have been shown then but that is not the case. There is also no discriminatory effect because just as in the cases above, everyone is treated equally under the statute and anyone can enter the market. *Id.* at 1030.

ACES will likely suggest that this court should follow the route taken in the *Nextera* case. But the major flaw there was that the statute in Texas did not allow new and free entry into the market which is not the case here. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). Therefore, the outcome even if applied should not be the same.

Therefore, there is no overt discrimination within the Native Transmission Protection Act and does not violate this portion of the Dormant Commerce Clause.

2. The Dormant Commerce Clause is not violated because the Native Transmission Protection Act provides more local benefits than any undue burden it could place upon interstate commerce.

The Native Transmission Protection Act benefit to Vandalia substantially outweighs any burden it may place upon interstate commerce. Because it allows for incumbent electric transmission owners who have shown they are dependable and can service Vandalia, who also

operate on coal to empower Vandalia's economy and citizens, the first opportunity at expansion within the state.

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (U.S. 1970).

In the *Lange* case the court had to do a *Pike* analysis to determine whether the Minnesota Right of First Refusal put too much a burden on interstate commerce. *Lange*, 329 F.Supp. 3d 695, 709 (D. Minn. 2018); *Pike*, 397 U.S. 137, 142 (U.S. 1970). The court there found that the:

> Minnesota legislature determined that it is necessary to provide "the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates," and that the legislation was necessary "to avoid unnecessary duplication of facilities which increase the cost of service to the consumer" and "to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers."

Lange, 329 F.Supp. 3d 695, 709 (D. Minn. 2018). And when balancing what Minnesota had found to be a benefit against the incidental burden on interstate commerce the court found LSP had failed to show any significant burden on interstate commerce. *Id.* at 710. LSP had tried to state that the Right of First Refusal had violated the FERC national uniformity goal, but the court pointed out that FERC "the agency charged by Congress with ensuring national regulation of electric markets, expressly approved the use of state right-of-first-refusal laws." *Id.*

Much like the case at hand, *Sieben* also had to analyze how the state Right of First Refusal affected commerce. *Sieben*, F.3d 1018, 1030 (8th Cir. 2020). LSP alleged that the Right of First Refusal had prevented it from being able to compete for Minnesota's MISO-approved transmission

projects. *Id.* Along with causing a "negative aggregate effect because []if every state were to adopt a ROFR statute, the cumulative effect of such statutes would nullify Order No. 1000[.]" *Id.* The court reasoned that this claims were ill-founded and held "th[e] record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely. Incumbents are not obligated to exercise their ROFRs, and some incumbents may not be obligated by their states' public utilities or service commissions to build federally-approved transmission lines." *Id.* at 1031.

The local benefits to Vandalia here are obvious, entities that operate within the state and produce energy based on coal continue to do so and build more lines that will use more coal. Moreover much like the situation in *Sieben*, where "Minnesota enacted its ROFR law, in part, in response to the uncertainty produced by FERC's Order 1000." *Id.* With a goal of keeping "the historically-proven status quo for the construction and maintenance of electric transmission lines." *Id.* "This goal is within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy." *Id.*; *See* 16 U.S.C. § 824(b)(1). The court also noted that "[t]he states retain authority over the location and construction of electrical transmission lines." *Sieben*, F.3d 1018, 1031 (8th Cir. 2020). The burden upon interstate commerce would be at best speculative, because nothing within the record suggests this could set a bad precedent. Nor does ACES having to wait cause a clear excessive burden on commerce, it's also worth noting that "the Supreme Court has rarely invoked Pike balancing to invalidate state regulation under the Commerce Clause." *S. Union Co. v. Mo. PSC*, 289 F.3d 503, 509 (8th Cir. 2002).

Therefore, the Native Transmission Protection Act does not violate the Dormant Commerce Clause of the Constitution and the verdict should be affirmed.

VI. CONCLUSION

The issue before the court is that of states rights. Congress was clear in their intention to allow states the right to retain control over the goings on of energy generation within their lines. ACES, again, is a giant global corporation with its sights on expansion and encroachment to the detriment of Vandalia's industry. ACES does not have standing to challenge the PSC's Capacity Factor Order. It has not articulated an injury nor a causal link to the CFO. The CFO is not preempted by FERC because Vandalia retains the right to legislate within its state the generation of power, and the CFO does not set wholesale rates. Vandalia is operating in the interest not only of its historical economic industry, but for the people who live and work there as well. That same interest is what is protected by the Native Transmission Protection Act. To strike down either the CFO or the Native Transmission Protection Act would be a direct assault on the families of Vandalia who so desperately rely on coal. Therefore, it is the Vandalia Public Service Commission's position that this Court should affirm the lower court's holding and uphold both the CFO and the Native Transmission Protection Act.

VII. CERTIFICATE OF SERVICE

Pursuant to Official Rule IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. certify that our *Team* emailed the brief (PDF version) to the West Virginia University Moot Court Board in accordance with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,

Team No. 25