UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.
Appellant,

v.

CHAIRMAN WILL WILLIAMSON, ***in his official capacity,***
COMMISSIONER CONNIE LOGAN, ***in his official capacity,***
COMMISSIONER EVELYN ELKINS, ***in her official capacity***
Appellees.

ON APPEAL FROM
THE U.S. DISTRICT COURT OF
THE NORTHERN DISTRICT OF VANDALIA

BRIEF FOR THE APPELLANT APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

Team 24
Counsel for the Appellant

TABLE OF CONTENTS

24

TABLE OF AUTHORITIES

Cases

<u>Statutes</u>

Regulations

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction to hear this case pursuant to 28 U.S.C. § 1331. The district court's federal question jurisdiction derives from issues arising under the United States Constitution, including one question of Constitutional standing, two alleged violations of the Supremacy Clause of the United States Constitution, and one alleged violation of the dormant Commerce Clause of the United States Constitution.

The Court of Appeals for the Twelfth Circuit has jurisdiction of this case under 28 U.S.C. § 1291. This appeal is of the district court's final order granting Appellee's motions to dismiss on all issues. The district court issued its final order on August 15, 2022. Appellant filed an appeal of that order on August 29, 2022.

ISSUES PRESENTED

I. Did the District Court err in finding that an energy corporation, who solely conducts business in the interstate wholesale electricity market, lacked standing to bring suit over a state Order which distorts price signals by setting an interstate wholesale rate?

II. Did the District Court improperly dismiss a Supremacy Clause claim when a state imposed a law that interfered with a federal agency's exclusive jurisdiction in the interstate energy market and hindered that organization's goal of setting an efficient market price?

III. Did the District Court improperly dismiss a Supremacy Clause claim when a state enacted a law specifically designed to contradict a federal agency's regulatory Order of the interstate electricity market over which Congress has granted the agency comprehensive authority?

IV. Did the District Court improperly dismiss a dormant Commerce Clause claim when a state enacted a law that explicitly discriminates against nonlocal electricity providers in favor of local ones, and the benefits brought by the state law are insignificant compared to the burdens it imposes upon interstate commerce?

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission ("FERC") is an energy agency that, under the Federal Power Act ("FPA"), has exclusive authority in regulating the transmission and sale of electricity at wholesale in interstate commerce. R.13. FERC is charged with ensuring that the interstate wholesale electricity rate is just and reasonable, and it achieves this objective by adopting policies which enhance competition and break down economic barriers that otherwise hinder the wholesale market. R.13. In furtherance of this goal, FERC established various organizations, known as RTO/ISO organizations, that are responsible for maintaining and operating electric transmission grids between several states, R.4.

The PJM Interconnection ("PJM") is one such RTO/ISO that serves the mid-Atlantic region, providing electricity through transmission lines that run through fourteen states, including Vandalia. R.3. As part of its authority under FERC, PJM operates both energy and capacity markets for interstate electricity. R.3. Both markets operate through a "market-clearing price" model, which is designed to efficiently allocate supply and demand within the PJM region. R.3.

The regional auction works as follows: utilities offer into an auction a price at which they can supply a specific number of megawatt-hours of electricity. R.3. At the start of the auction, the cheapest sources "clear" the market and are added to the regional supply until demand is met. R.3. Once supply matches demand, the price of the last source to be offered is the "market-clearing price" that is paid to every source that cleared the market. R.3. While the energy market is based on current demand for electricity, the capacity market predicts demand three years into the future and allows companies to offer into the auction based on how much "capacity" for electricity they can produce at that future time. R.3. The "market-clearing price" itself is relied upon by energy generators to predict where there are supply shortages in electricity. R.3-4.

Appalachian Clean Energy Solutions, Inc. ("ACES") is a global energy company that is headquartered in Springfield, Vandalia. R.4. ACES' portfolio includes multiple forms of energy sources and is capable of generating 6.5 gigawatts of electricity across the country. R.4. ACES operates entirely in the wholesale electricity market by participating in various competitive regional wholesale markets, including PJM, and has no other source of business or revenue. R.4-5. In addition to its participation in the electricity market, ACES owns and operates 16,000 circuit miles of high-voltage transmission lines throughout the Eastern Interconnection. R.5.

As part of a greater decarbonization effort, ACES has announced plans to construct the "Rogersville Energy Center," a 1,800 MW combined-cycle natural gas-fired generating plant in Greene County, Pennsylvania. R.5. The Rogersville Energy Center will utilize the abundant natural gas resources in the region and capture 75% of its carbon emissions. R.5. The estimated cost of the generating plant is approximately $3.1 billion. R.5.

To accommodate output from the Rogersville Energy Center, ACES also plans to construct a 460 mile, 500 kilovolt (kV) high-voltage transmission line, dubbed the "Mountaineer Express," from Rogersville, Pennsylvania to Raleigh, North Carolina. R.5. The Mountaineer Express was originally planned to pass through Vandalia and has potential to incorporate intermediate substations along the line to accommodate integration of additional resources throughout its length. R.6. It was approved by the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan (“RTEP”) in March 2022. R.10.

Before the Mountaineer Express could be constructed, however, ACES was obstructed by the Vandalia Public Service Commission (“Vandalia PSC”). R.7. The PSC is a state government agency charged with regulating rates and practices of electric utilities providing retail service within Vandalia. R.6. The Vandalia legislature has issued specific directives to the PSC to ensure that coal remains the dominant source of energy in Vandalia. R.6. Pursuant to this directive, the Vandalia PSC has taken three actions, two of which are at issue, which have broad implications for ACES’ construction plans and the future of its projects in the PJM region. R.7.

The PSC’s first action regarded two in-state electric utilities, LastEnergy and MAPCo, and their failure to reach optimal capacity factor percentage in their coal-fired power plants. R.7. Due to the availability of cheaper energy supplies in the region, LastEnergy and MAPCo have been forced to run their power plants at a capacity factor of less than 70% to minimize costs of operation. R.7. Both utilities are required to exclusively sell to the PJM market pursuant to their Fixed Resource Requirement status. R.8.

In response, the Vandalia PSC enacted a Capacity Factor Order (CFO) which required the utilities to run their coal-fired plants at a capacity factor of 75% or greater, regardless of whether it would be economical to do so. R.8. To assuage fears that the Vandalia utilities cannot, in fact, run economically at such a percentage, the CFO authorized cost recovery in LastEnergy and MAPCo’s retail rates, if the cost to run at 75% capacity is greater than the PJM market-clearing price. R.8. For example, if the PJM market-clearing price is $50 per MWh of electricity, but the cost of producing electricity at a particular coal plant is $70 per MWh, the CFO requires the utility to recover the entire amount ($20 per MWh) by raising retail rates for its customers. R.8.

The Vandalia PSC is confident that LastEnergy and MAPCo can run their plants at 75% capacity factor without the need for cost recovery, but historical records disagree. R.8-9. In the previous year, LastEnergy and MAPCo's coal plants are only able to run at a capacity factor ranging from 40% to 60%. R.7-9. Should the CFO be allowed to stand, cost recovery will have to occur in order for the Vandalia utilities to run economically at a capacity factor of 75%. R.9.

The second controversial action by the PSC was in response to FERC's issuance of Order 1000, which required ISOs to eliminate Right of First Refusal ("ROFR") provisions for regional transmission facilities. R.9. ROFR provisions gave owners of incumbent transmission facilities the exclusive right to construct new facilities in their service areas, even if nonincumbent owners applied and could maintain the facility more efficiently. R.9. Due to a lack of competition and efficiency, FERC used its exclusive authority over the interstate electricity market to issue Order 1000 and end such ROFR policies. R.9.

In response, the Vandalia PSC passed the Native Transmission Protection Act ("NTPA"), which reinstated the ROFR for incumbent transmission owners over new transmissions projects in Vandalia. R.9. Under the NTPA, incumbent utilities have eighteen months to exercise their ROFR to construct and maintain transmission lines before a nonincumbent owner receives the same opportunity. R.9. Vandalia enacted the NTPA as a direct response to the ending of federal ROFR proposals, and the law has the same effect in Vandalia as those policies that were previously ended by Order 1000. R.9. In March 2022, ACES submitted an application for a Certificate of Public Convenience and Necessity for construction of Vandalia portions of the Mountaineer Express. R.10. However, because LastEnergy and MAPCo are the incumbent electric transmission owners in Vandalia, the PSC cannot take any action regarding ACES' application until September 30, 2023, pursuant to the State-imposed ROFR. R.10.

On June 6, 2022, ACES filed suit against the Vandalia PSC over its Capacity Factor Order and Right of First Refusal. R.14-15. Regarding the CFO, ACES argued that Vandalia's program effectively sets an interstate wholesale rate within the PJM market and consequently distorts the PJM auction's price signals. R.14. By distorting auction price signals, the PSC interferes with FERC's goals of achieving an efficient, predictable interstate electricity market in the region. R.14. ACES additionally argued that the CFO is preempted by the FPA under the Supremacy Clause because it compels coal-burning utilities to sell their energy into the PJM market, thereby intruding on FERC's exclusive jurisdiction. R14. In support of its claim, ACES cited *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016), which struck down a similar state order which was found to set an interstate wholesale rate in the market. R.14.

On June 27, 2022, the PSC moved to dismiss ACES' action regarding the CFO for failure to state a claim for two reasons. R.14. First, the PSC argued that ACES does not have standing to challenge the CFO because ACES is not subject to the Order, is not a ratepayer affected by the order, and only suffers speculative injury because the PSC believes that LastEnergy and MAPCo can run economically at 75% capacity. R.14. Second, the PSC argued that the CFO is not preempted because there is no "tether" to the wholesale market, since LastEnergy and MAPCo are not required by the CFO to sell into PJM. R.15. The PSC cited a series of cases in which state issuance of "zero emission credits" ("ZECs") were not preempted by FERC's jurisdiction. R.15.

The district court granted PSC's motion to dismiss for lack of standing, and additionally found that, even if ACES had standing, the CFO does not violate the Supremacy Clause when compared to the ZEC line of cases. R.15.

Regarding Vandalia's NTPA, ACES challenged the law on both Supremacy Clause and dormant Commerce Clause grounds. R.15. Under the Supremacy Clause, ACES argued FERC's

Order 1000 clearly prohibits all state ROFR laws, including the NTPA. R.15. ACES elaborated that Vandalia's ROFR is the same as an ROFR adopted by Texas, which was struck down on a dormant Commerce Clause challenge by the Fifth Circuit because it prevented out-of-state transmission line owners from entering into portions of the interstate transmission market. R.15. Furthermore, Vandalia's ROFR requires an eighteen month waiting period, which essentially prevents any new entrants into the market due to the uncertainty, costs and risks associated with a proposed transmission project. R.15. Finally, ACES argued that the NTPA poses such a negative effect on commerce that it is clearly excessive when compared to its putative benefits in violation of the dormant Commerce Clause. R.15-16.

On June 27, 2022, the PSC also moved to dismiss ACES' claims regarding the ROFR. R.16. It argued that the Native Transmission Protection Act was not preempted due to its similarities with other legislation that has been previously upheld. R.16. The PSC also claimed that there is no discrimination against out-of-state entities, as both ACES and the incumbent utilities are incorporated outside of Vandalia. R.16. It argues that the eighteen month incumbency period makes its ROFR less egregious than previous laws that were struck down. R.16.

The district court also granted the PSC's motion to dismiss regarding the ROFR. R.16. It found that the ROFR was not preempted by Order 1000, and rejected the dormant Commerce Clause challenge, finding that place of incorporation controls. R.16. The court also determined that the burden imposed by the ROFR on interstate commerce did not exceed the local benefits to Vandalia, and therefore did not violate the dormant Commerce Clause. R.16.

The district court granted the PSC's motion to dismiss on all issues on August 15, 2022. R.15-16. ACES filed a timely appeal on August 29, 2022. R.16.

SUMMARY OF THE ARGUMENT

The district court erred in granting Appellee's motions to dismiss all issues. First, the district court erred in granting the PSC's motion to dismiss ACES' Supremacy Clause challenge to the Vandalia CFO due to lack of standing. As a participant in the wholesale electricity market, ACES relies upon market-clearing price signals to determine where to invest its resources. By authorizing price recovery when Vandalia utilities fail to meet the PJM market-clearing price, the CFO effectively sets an interstate rate that cannot be relied upon as a price signal, causing injury to ACES by making it unable to predict the future of a market in which it has already made a multi-billion-dollar investment.

Second, the Vandalia CFO is both field and conflict preempted by federal law. FERC has exclusive jurisdiction to regulate interstate wholesale rates, and pursuant to *Hughes v. Talen Energy Marketing, LLC*, state regulations which have the effect of setting an interstate wholesale rate are preempted by federal law. Vandalia's CFO sets a wholesale rate in the PJM market and therefore intrudes upon FERC's exclusive authority, prompting field preemption. FERC also has a goal of ensuring efficient interstate rates in the regional market, and state regulations which impede federal goals are conflict preempted. The Vandalia CFO's distortion of price signals makes it difficult to predict supply and demand of electricity. Therefore, the CFO interferes with FERC goals of efficiency and is conflict preempted.

The district court erred by comparing the Vandalia CFO to a line of cases dealing with Zero Emission Credits (ZECs). Unlike the state ZECs, the CFO is tethered to wholesale market participation because: 1) the subsidy that it provides to electric utilities is based solely on the difference between operating costs and the market-clearing price; and 2) utilities subject to the

CFO are required to sell into the interstate wholesale market. Due to this tether to wholesale market participation, the CFO is preempted by federal law.

Third, the district court incorrectly granted the PSC's motion to dismiss ACES' Supremacy Clause challenge to Vandalia's statutory ROFR because the state ROFR is both field and conflict preempted by FERC Order 1000. The FPA's broad grant of authority to FERC demonstrates Congress' intent that FERC regulation entirely occupy the field of interstate electricity transmission. Because FERC occupies this field per its Congressional mandate, Vandalia's ROFR is field preempted by Order 1000. FERC Order 1000 also conflict preempts Vandalia's statutory ROFR. Pursuant to its Congressional mandate, Order 1000 removed the ROFR to keep electricity rates reasonable. Vandalia's statute re-establishes an ROFR explicitly to counteract Order 1000. Because Vandalia's statutory ROFR stands as an obstacle to the goals of federal legislation, it is also conflict preempted under the Supremacy Clause.

Finally, the district court incorrectly granted the PSC's motion to dismiss the dormant Commerce Clause claim because Vandalia's statutory ROFR passes neither strict scrutiny analysis nor the *Pike* balancing test. Vandalia's ROFR on its face discriminates against nonlocal utilities providers in favor of local ones, making it *per se* unconstitutional. Nor does Vandalia's ROFR pass strict scrutiny analysis; ensuring the reliability of the power grid—the only legitimate state purpose for the statute—could be accomplished through less discriminatory regulations. Therefore, this court should find that Vandalia's ROFR violates the dormant Commerce Clause.

Even if this court does not find Vandalia's ROFR facially discriminatory, the statute at the very least has a discriminatory effect. Facially neutral statutes that have a discriminatory effect must pass the *Pike* balancing test, which weighs the benefits brought by the law against its burdens on interstate commerce. Because the burdens Vandalia's ROFR places on interstate commerce outweighs the marginal benefits it brings to the state, this court should find that Vandalia's ROFR violates the dormant Commerce Clause.

ARGUMENT

I. INTERSTATE ELECTRICITY GENERATORS SUFFER IMMINENT, CONCRETE INJURY WHEN THEY CAN NO LONGER GAUGE INVESTMENT BASED ON PRICE SIGNALS IN THE INTERSTATE WHOLESALE MARKET BASED ON THE MARKET-CLEARING PRICE.

Questions of standing are a purely legal matter, therefore the standard of review is *de novo*. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1087 (9th Cir. 2010).

The district court improperly dismissed ACES' claim against the Capacity Factor Order (CFO) for lack of standing because the CFO causes significant unpredictability in the PJM capacity market, into which ACES has already substantially invested. This outcome is not speculative due to existing evidence that the coal plants subject to the CFO are unable to operate economically at the required capacity factor percentage.

In order to have standing, the plaintiff must establish: 1) that he suffered an actual or imminent "injury in fact," which must be concrete and particularized; 2) that the injury is fairly traceable to the defendant's conduct; and 3) that the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

The courts have found particularized injury to plaintiff electric providers where states take measures to prevent in-state utilities from paying the efficient market-clearing price in a capacity market. *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 159 (2016); *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372, 392-94 (D.N.J. 2013), *aff'd sub nom. PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). Particularized injury, the courts found, arises because state interference in the market makes it difficult for electric providers to determine where there is demand for electricity and invest accordingly. *Hughes*, 578 U.S. at 162; *Hanna*, 977 F.Supp.2d at 400-402.

In *PPL EnergyPlus, LLC v. Hanna* and *Hughes v. Talen Energy Marketing, LLC*, New Jersey and Maryland, respectively, enacted similar regulatory schemes in which in-state electricity generators were required to sell capacity into the PJM market, and were in exchange guaranteed a "contract price" independent of the market-clearing price. *Hughes*, 578 U.S. at 158-59; *Hanna*, 977 F.Supp.2d at 394. In *Hanna*, the state-implemented contract pricing allowed in-state utilities to be paid a higher rate than the market-clearing price, causing other wholesale market participants to raise their own rates, ultimately resulting in the market-clearing price being "essentially displaced and supplanted" by the contract price. 977 F.Supp.2d at 400. *See also Hughes*, 578 U.S. at 163 (agreeing with the 4th Circuit that Maryland's contract pricing "sets an interstate wholesale rate"). By supplanting the market-clearing price with its own contract price, the state effectively renders the price signals of the market-clearing price useless, causing significant difficulties for the out-of-state electricity providers who rely on them. *Hanna*, 977 F.Supp.2d at 401 (taking note of an example wherein unpredictable state manipulation of contract pricing adversely affected out-of-state utilities who had relied on the price signals of the market-clearing price). In both *Hanna* and *Hughes*, the courts found actionable injury to the plaintiffs where state regulation of the capacity market caused significant market unpredictability that disrupted price signals, and Plaintiffs therefore had standing in both cases. *Hughes*, 578 U.S. 163; *Hanna*, 977 F.Supp.2d at 405.

In the present case, the Vandalia PSC's Capacity Factor Order similarly has the effect of setting an interstate wholesale rate in the capacity market, causing injury to ACES by impacting the accuracy of price signals. Similar to the contract pricing of Maryland and New Jersey's regulatory schemes in *Hanna* and *Hughes*, Vandalia's CFO forces LastEnergy and MAPCo to operate independently of the PJM market-clearing price. R.8. In exchange for operating their coal-fired plants to achieve a capacity factor of 75%, the utilities must engage in cost recovery to make up the difference between the market-clearing price and the actual cost of operation by charging ratepayers, allowing LastEnergy and MAPCo to sell capacity at rates higher than the PJM market-clearing price. R.8. Like the contract pricing in Maryland and New Jersey, this has the residual effect of driving other utilities to also charge higher rates to stay competitive, resulting in the lower market-clearing price being entirely supplanted by the CFO-approved rate. Because the wholesale market rate is now dictated by a state regulation rather than the efficient market-clearing price, energy companies such as ACES are faced with an unpredictable market where they cannot gauge demand for electricity based on the price signals. Therefore, as was ruled in *Hanna* and *Hughes*, there is injury where ACES and other electricity generators stand to lose revenue due to market unpredictability.

ACES suffers a particularly concrete loss due to an unpredictable market because it already has a multi-billion dollar investment in the PJM region. ACES has announced plans to construct two projects in the PJM market with a combined investment total of $4.8 billion. R.5-6. However, like the circumstances in *Hanna*, because Vandalia's CFO is now determining the wholesale market rate and distorting price signals, the market into which ACES has already made a substantial investment is now subject to unpredictability, and ACES stands to lose revenue as a result. Such a loss is traced to the PSC's Capacity Factor Order and may be avoided by a judicial determination to strike down the regulation.

Defendants argued that ACE's injury is too speculative to be redressed by the court, based on the PSC's findings that the coal plants in Vandalia may be able to economically run at 75% capacity; in other words, arguing that costs of operation would not fall below the market-clearing price. R.8. However, this prediction does not reflect reality, as LastEnergy and MAPCO have only been able to achieve a capacity factor of 40-60% in the past year. R.7. When LastEnergy and MAPCo once again prove to be unable to operate economically at 75% capacity, cost recovery will be necessary to make up for the plants' operating costs. This sets an interstate wholesale rate that forces inefficiency and unpredictability into the PJM market.

ACES suffers a concrete injury because it relies on distorted price signals that result from Vandalia CFO's setting of the wholesale rate, and such injury may only be redressed by judicial intervention. Therefore, ACES has standing in the present case.

II. STATE REGULATIONS ARE PREEMPTED BY FEDERAL LAW WHEN THEY OCCUPY THE FIELD OF THE WHOLESALE ELECTRICITY MARKET, STAND AS AN OBSTACLE TO FERC'S GOAL OF MAINTAINING AN EFFICIENT MARKET, AND ARE TETHERED TO WHOLESALE MARKET PARTICIPATION.

The court of appeals reviews constitutional challenges to laws *de novo*, requiring no deference to the trial court's decision. *US v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007).

The district court erred in granting Appellee's motion to dismiss the Supremacy Clause claim because the Capacity Factor Order is both field and conflict preempted by federal law.

The Supremacy Clause of the United States Constitution states that federal laws are the "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. "Put simply," the Supreme Court has declared, "federal law preempts contrary state law." *Hughes v. Talen Energy Marketing, LLC,* 578 U.S. 150, 162 (2016). Congress has the power to preempt state law due to its explicit statutory language, or implicitly through field or conflict preemption. *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas et al.*, 489 U.S. 493, 509 (1989).

Vandalia's CFO runs afoul of both types of preemption. First, the Supreme Court has ruled that FERC-set market rates field preempt state electricity rate regulation, making Vandalia's CFO an invalid intrusion on FERC's authority. *Hughes,* 578 U.S. at 166. The Vandalia CFO also conflicts with FERC's goals of efficiently regulating the interstate market by setting an inefficient wholesale price and distorting price signals, making it an "obstacle to the accomplishment and execution" of federal law. *Hines v. Davidowitz,* 312 U.S. 53, 67 (1941). Finally, the district court erred by comparing this case to a series of Zero Emission Credit (ZEC) cases and in dismissing ACES' Supremacy Clause claim due to a lack of "tether" between the Vandalia CFO and the wholesale market as required under *Hughes*. 578 U.S. at 166. The Vandalia CFO is distinguishable from the ZEC line of cases, and is tethered to wholesale market participation because the CFO is a subsidy based on the wholesale market rate, and the companies who are subject to the CFO are required to sell into the wholesale market.

A. <u>The Vandalia CFO is subject to field preemption because it interferes with FERC's exclusive control of the wholesale market by manipulating the wholesale price.</u>

This court should find that the Vandalia's CFO is preempted by federal law because FERC regulation has completely occupied the field of wholesale electricity rates. Therefore, Vandalia's CFO is an invalid intrusion in a field of federal authority.

Field preemption occurs when Congress has legislated so comprehensively as to occupy an entire field of regulation. *Hines*, 312 U.S. at 62-63. Courts have ruled that Congressional intent to preempt state law can be inferred from pervasive federal regulation in a certain field. *Arizona v. U.S.*, 567 U.S. 387, 399 (2012). This form of "field preemption" occurs when federal legislation is "so comprehensive [as to] occupy an entire field of regulation, leaving no room for the states to supplement federal law." *Hughes*, 578 U.S. at 163 (internal quotation marks omitted).

The Federal Power Act (FPA) grants FERC exclusive authority in regulating wholesale rates. *Hughes*, 578 U.S. at 154. The courts have repeatedly held that preemption occurs when states enact orders which set *or have the effect of setting* an interstate wholesale electricity rate because these state orders intrude on FERC's exclusive authority. *Hughes*, 578 U.S. at 164; *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986); *Appalachian Power Co. v. Public Service Com'n of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987); *PPL Energy Plus v. Hanna*, 977 F.Supp.2d 372, 408 (D.N.J. 2013); *See also Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988) (holding that "trapping" costs, mandated to be paid by FERC order, was preempted by the FPA).

Hughes v. Talen Energy Marketing, LLC elaborates on the circumstances in which state regulation on the interstate energy market is preempted. 578 U.S. at 162-166. In *Hughes*, the Maryland Public Service Commission (PSC) required "load serving entities" (LSE's) to enter into a pricing contract in which capacity is sold into the interstate market in return for a contract rate. *Id.* at 158-159. If the market-clearing price was below the contract price, the LSEs make up the difference by passing the cost onto consumers in the form of higher retail prices. *Id.* at 160. Under this regulation, capacity was required to have been sold into the PJM interstate auction. *Id.* at 163. The Supreme Court found that this effectively sets an interstate wholesale rate, which is the exclusive jurisdiction of the FERC, and was therefore preempted by federal law. *Id.* at 163, 165. The court's holding extended to all state regulations which disregard the wholesale rate by conditioning "payment of funds on capacity clearing the auction." *Id.* at 166.

The Vandalia CFO is similarly field preempted because it sets an interstate wholesale rate, thereby intruding on FERC's jurisdiction. Like companies under Maryland's pricing contract in *Hughes*, LastEnergy and MAPCO are required to sell their capacity into the interstate wholesale market, and the CFO authorizes cost recovery by raising the retail rates of consumers if the market-clearing price is lower than the utilities' operating costs. R.8. This allows the Vandalia utilities to disregard the wholesale rate if they don't clear the capacity auction and effectively raises the interstate rate once other utilities are forced to price-match. R.8. As established in *Hughes*, FERC has exclusive jurisdiction in the interstate electricity market, and any state regulation that conditions payments on the market-clearing price is preempted. Because the Maryland pricing contract and the Vandalia CFO force utilities to sell capacity and receive a payment of funds in return, both intrude on FERC's exclusive field of jurisdiction. Therefore, the Vandalia CFO is preempted by federal law, just as the Maryland pricing contract was preempted in *Hughes*.

B. The Vandalia CFO is subject to conflict preemption because its distortion of auction price signals interferes with FERC's goal of facilitating an economical wholesale market.

The Vandalia CFO interferes with interstate wholesale clearing prices and should therefore be conflict preempted, as such interference stands as an obstacle to FERC's goal of setting efficient interstate electricity prices.

Conflict Preemption occurs where a state law "stands as an obstacle" to the execution of the goals and purposes of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Under its exclusive authority over the interstate wholesale market, FERC has a goal of ensuring market efficiency by "overseeing the integrity of the interstate energy markets." *New Jersey Bd. of Public Utilities v. F.E.R.C.*, 744 F.3d 74, 81 (3d Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016). FERC accomplishes this goal by allowing electricity generators to bid into the energy and capacity markets and by establishing an efficient market-clearing price. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 472 (4th Cir. 2014). Conflict preemption has been found where states make judicial claims or take legislative actions which manipulate the wholesale market because it interferes with FERC's goal of achieving market efficiency. *See, e.g.*, *Nazarian*, 753 F.3d at 480; *Public Utility Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 850-851 (9th Cir. 2004); *Hanna*, 977 F.Supp.2d at 411.

By setting an interstate wholesale rate and interfering with price signals in the PJM market auction, the Vandalia CFO conflicts with FERC's goal of maintaining an efficient market and is therefore preempted. The CFO requires LastEnergy and MAPCo's utilities to run at 75% capacity and sell into the PJM market, and authorizes cost recovery when it can't meet the market-clearing price. R.8. Not only does this set a higher wholesale rate than what was deemed efficient by FERC, but it also distorts price signals by suggesting that there is demand for low-cost electricity in the PJM region, when the efficient price is actually much lower than indicated. These downstream effects of the CFO result in an inefficient market that is being manipulated by the states, intruding on FERC's goal to encourage a competitive and efficient interstate market. Because it is an obstacle to FERC's goals, the CFO is conflict preempted.

C. <u>The district court erred by comparing the Vandalia CFO to the ZEC line of cases when the CFO is "tethered" to the wholesale market and is therefore preempted by federal law.</u>

In dismissing Appellant's claim, the district court relied on a series of cases dealing with state-imposed ZEC programs which were not preempted; however, these laws are distinguishable from the Vandalia CFO and, therefore, the ZEC line of cases should not be followed.

Following the Supreme Court's ruling that Maryland PSC's contract pricing was preempted by federal law, *Hughes*, 578 U.S. at 165, the Second and Seventh Circuits distinguished two states' ZEC programs, finding that they were not preempted by the FPA and FERC. *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018); *Electric Power Supply Association v. Star*, 904 F.3d 518, 524 (7th Cir. 2018).

In *Zibelman*, the New York Public Service Commission (PSC) implemented a ZEC program that provided a subsidy for nuclear plants. 906 F.3d at 47. The amount paid in the subsidy was calculated every two years, dependent on two factors: 1) adjustment based on whether New York "experiences 'additional renewable energy penetration;'" and 2) adjustment based on "*forecast* wholesale prices." *Id.* at 48 (emphasis added). The circuit court distinguished New York's ZEC from *Hughes* because the ZEC was not "tethered" to wholesale market participation for two reasons. *Id.* at 51, *citing Hughes*, 578 US at 166. First, the amount paid in the ZEC subsidy is not based on the current wholesale market-clearing price. *Id.* Second, the electricity generators who received the subsidy were not required to sell into the wholesale electricity market. *Id.* at 52. As a result of these two distinguishing factors, the New York ZEC was not "tethered" to wholesale market participation and preemption did not occur. *Id.* at 57.

A similar fact pattern is present in *Star*, wherein Illinois granted a ZEC credit at a set rate, rather than being based on the wholesale market-clearing price. 904 F.3d at 521-522 Additionally, firms who received the ZEC credit were not required to sell into the wholesale market. *Id.* at 523. For these two reasons, the court found that the state ZEC credit was "untethered" to the wholesale market and therefore was not preempted. *Id.* at 523-524.

The district court erred in analyzing the present case based on the ZEC line of cases because Vandalia's CFO does not include two major factors that prevented the previous state subsidies from being "tethered" to the wholesale market. Vandalia's CFO is not comparable to state ZECs because 1) the subsidy provided by the CFO is based solely on the wholesale market rate; and 2) utilities subject to the CFO are required to sell into the wholesale market.

First, Vandalia's CFO provides a subsidy that makes up the entire difference between the utility's operating cost and the wholesale market-clearing price. R.8. This is most comparable to

Maryland's contract pricing in *Hughes*, which also provided a subsidy based solely on the difference between a contract price and the wholesale market rate. *Hughes*, 578 US at 160. The Vandalia CFO is distinguishable from New York's ZEC subsidy in *Zibelman*, which was based both on renewable energy sources in the state and wholesale market *forecasts*, rather than a difference between operating costs and the actual rate itself. 906 F.3d at 51. The CFO is also distinguishable from Illinois' ZEC subsidy in *Star*, which is distributed at a set rate, rather than making up the difference of the wholesale rate. 904 F.3d at 521-22.

Second, unlike the utilities in the ZEC line of cases, LastEnergy and MAPCo are required to exclusively sell into PJM due to their Fixed Resource Requirement (FRR) status. R.8. Though the CFO does not explicitly force utilities to engage in the interstate market, it applies to utilities that exclusively engage in wholesale market participation, establishing a "tether" to PJM that causes inefficient pricing, distorted price signals and, consequently, preemption as per *Hughes*.

Because the Vandalia CFO bases its subsidy payment solely on the difference between the market-clearing price and operating costs, and because the utilities subject to the CFO are required to sell into the wholesale market, the CFO is tethered to wholesale market participation and is therefore both field and conflict preempted by federal law.

III. <u>THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION TO DISMISS THE SUPREMACY CLAUSE CLAIM BECAUSE THE STATE'S RIGHT OF FIRST REFUSAL STATUTE IS PREEMPTED BY THE FERC ORDER UNDER BOTH FIELD PREEMPTION AND CONFLICT PREEMPTION.</u>

The court of appeals reviews constitutional challenges to laws *de novo*, requiring no deference to the trial court's decision. *US v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007).

A. <u>Vandalia's ROFR is field preempted by Order 1000 because FERC regulations completely occupy the field of interstate power rates.</u>

The District Court improperly granted Appellee's motion to dismiss the Supremacy Clause claim because FERC's regulation of interstate energy transmissions completely occupies the field of energy regulations. As a federal regulation in this occupied field, FERC Order 1000 therefore preempts Vandalia's ROFR.

As discussed in *supra* Section II, federal law preempts contrary state law under the Supremacy Clause of the United States Constitution. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162 (2016). Known as field preemption, this form of preemption occurs when federal legislation is "so comprehensive[] [as to] occupy an entire field of regulation, leaving no room for the states to supplement federal law." *Id.* at 163 (internal quotation marks omitted).

The courts have recognized that FERC's enabling statute, the FPA, gives the Commission "exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce," *Hughes*, 578 U.S. at 154, which includes "regulatory authority over the facilities used for the transmission and sale of interstate energy." *Appalachian Power Co. v. Public Serv. Com'n of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987). Accordingly, the courts have held several times that the scheme of federal regulation established by the FPA so occupies the field of electricity rate regulation as to preempt conflicting state laws. *See Hughes*, 578 U.S. at 165; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988); *see also supra* Section II.A.

This court should likewise find that Order 1000's regulation of project planning similarly preempts state law, because Congress has so comprehensively legislated electricity regulation through the FPA that there is no room left for state legislation. The FPA itself declares that FERC may regulate the transmission and sale of electricity in interstate commerce, and specifically notes that "the Commission shall have jurisdiction over *all facilities* for such transmission of electric energy." Federal Power Act, 16 U.S.C. § 824(a)-(b)(1) (emphasis added). The Act further states that the Commission is empowered to remedy any rule or regulation that results in "unjust, unreasonable [or] unduly discriminatory" interstate electricity rates. Federal

Power Act, 16 U.S.C. § 824e(a). This scheme of regulation established by the FPA for the regulation of power facilities is just as comprehensive as the one found to preempt state law in *Hughes*. Like FERC's rate-fixing regulations that preempted state laws in the above cases, Order 1000 here is a direct effort by FERC to ensure just and reasonable electricity rates pursuant to its mandate in the FPA. *See* 18 C.F.R. Part 35 at ¶ 229 (2011) (Order 1000).

The FPA's grant of authority to fix electricity rates goes hand in hand with the authority it grants FERC to set regulations: the FPA states outright that whenever the Commission determines that there are unjust rates—or regulations or practices causing such rates—FERC may "determine the just and reasonable rate…*rule*, [or] *regulation*…to be thereafter observed." Federal Power Act, 16 U.S.C. § 824e(a) (emphasis added). The interconnected nature of FERC's power to fix rates and its power to enact electricity transmission regulations reveal Congress' intent that FERC have similar authority to perform both functions. If the courts have declared that Congress, through enacting the FPA, has occupied the field of interstate electricity price regulation, this court should likewise find that Congress intended to occupy the field of interstate electricity regulation, when the FPA's authority over both fields is derived from the same statutory provision.

Because the FPA grants FERC broad authority over regulation of electricity transmissions, this court should find that Congress intended to occupy the field of interstate electricity transmissions regulation. Therefore, this court should rule that Order 1000 preempts Vandalia's NTPA.

B. <u>Vandalia's ROFR is conflict preempted by Order 1000 because the state law is an obstacle to the execution of the full purpose of Order 1000.</u>

The district court further improperly granted Appellee's motion to dismiss the Supremacy Clause claim because Vandalia's ROFR directly conflicts with the objective of FERC Order

1000. Because Vandalia's ROFR stands as a direct obstacle to the goals of federal law, this court should find that Order 1000 preempts the NTPA under the Supremacy Clause.

The Supreme Court has held that state laws are preempted when they conflict with federal law. *Arizona v. U.S.*, 567 U.S. 387, 399 (2012). This conflict preemption occurs where "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). A state law is an "obstacle" to the accomplishment of a federal law if it frustrates the intended purposes and effects of the federal law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

The courts have frequently found state energy laws and regulations to be preempted when they conflict with the goals of FERC. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014); *Public Utility District No. 1 v. IDACORP Inc.*, 379 F.3d 641 (9th Cir. 2004); *Algonquin Gas Transmission, LLC v. Weymouth, Mass.*, 919 F.3d 54, 65 (1st Cir. 2019); *see also supra* Section II.B. In *PPL EnergyPlus*, which concerned a Maryland state order granting a bid to an energy company at terms that interfered with FERC-determined energy rates, the court found the Maryland order was conflict preempted specifically because it undercut FERC's method of achieving its statutory goal of incentivizing new electricity generation sources. 753 F.3d at 478. Because Maryland's order "interfer[ed] with the method by which the [FERC order] was designed to reach its goals," the state order posed an obstacle to execution of federal law. *Id*. (internal quotations omitted) (quoting *IDACORP Inc.*, 379 F.3d at 650).

Vandalia's NTPA similarly conflicts with federal law. Like the Maryland order struck down in *PPL EnergyPlus*, Vandalia's ROFR also poses an obstacle to the execution of federal law by undercutting FERC's methods of achieving its Congressional purpose. The express purpose of Order 1000's removal of the ROFR is to prevent unreasonable electricity prices, which is FERC's Congressional mandate under the FPA. Order 1000 at ¶ 253 ("Failure to [remove the ROFR]…can result in rates for Commission-jurisdictional services that are unjust and unreasonable"); *see also* Federal Power Act, 16 U.S.C. § 824e(a).

Vandalia's NTPA, in reinstating the incumbent ROFR, directly and unconstitutionally conflicts with the method FERC has chosen to fulfill Congress' statutory directive. *IDACORP Inc.*, 379 F.3d at 650 (holding that a state law is conflict preempted where it "interferes with the method by which the federal statute was designed to reach it[s] goals"). The legislative history of the NTPA reveals that the main purpose of the bill is, in fact, to contradict Order 1000. R. 9. By reinstating the exact measure FERC eliminated to prevent unreasonable electricity rates per its Congressional mandate, Vandalia's ROFR law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 68.

Because Vandalia's Native Transmission Protection Act directly conflicts with the purposes and goals of FERC Order 1000, the state law is conflict preempted. Therefore, this court should reverse the lower court's judgment and find the NTPA preempted under the Supremacy Clause.

IV. THE DISTRICT COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS THE COMMERCE CLAUSE CLAIM BECAUSE THE STATE'S RIGHT OF FIRST REFUSAL UNCONSTITUTIONALLY DISCRIMINATES AGAINST NONLOCAL ENERGY PROVIDERS.

The court of appeals reviews constitutional challenges to laws *de novo*, requiring no deference to the trial court's decision. *US v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007).

A. The district court erred in granting Appellee's motion to dismiss the dormant Commerce Clause claim because the Vandalia's ROFR is facially discriminatory and there are less discriminatory means of accomplishing its purpose.

The district court erred in granting PSC's motion to dismiss ACES' dormant Commerce Clause claim because Vandalia's ROFR discriminates on its face against nonlocal electric transmissions owners in favor of local ones. Although incumbent electric transmissions owners under Vandalia's ROFR may be incorporated out of state, this court should follow precedent established by multiple circuits and find that it is the local presence of the interests preferred by the state law—not their place of incorporation—that controls in dormant Commerce Clause cases. This court should apply the strict scrutiny test to the Vandalia's ROFR and find it violates the dormant Commerce Clause.

Under the United States Constitution, Congress has the power to regulate commerce among the states. U.S. Const. art. I, §. 8, cl. 3. The Supreme Court recognizes this clause as having a "dormant" aspect that prohibits the states from passing laws that limit interstate commerce. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). State laws that are facially discriminatory by favoring in-state parties over out-of-state ones are *per se* unconstitutional and will be upheld only if there is no less discriminatory means of achieving their purpose. *City of Philadelphia*, 437 U.S. at 624; *Granholm v. Heald*, 544 U.S. 460, 489 (2005). While the district court found the ROFR nondiscriminatory because the incumbent power providers favored by the law are incorporated out of state, this court should reject such a narrow interpretation of the dormant Commerce Clause. Instead, this court should follow precedent established by several other circuits and hold that the primary location of the favored interests, rather than their place of incorporation, controls. Following this precedent, Vandalia's ROFR is invalid under the dormant Commerce Clause because it explicitly prioritizes incumbent electric transmissions owners and does not pass the strict scrutiny analysis.

1. Vandalia's ROFR is facially discriminatory, even when the favored interests may legally be residents of another state, because it discriminates against nonlocal power companies in favor of local ones.

This court should reject the district court's restrictive interpretation of the dormant Commerce Clause and hold that, even though incumbent power companies may be legally incorporated outside of Vandalia, the state's ROFR is still facially discriminatory because it discriminates against nonincumbent power companies in favor of local ones.

Under the dormant Commerce Clause, state laws that are facially discriminatory against out-of-state parties in favor of in-state ones are *per se* unconstitutional. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Supreme Court precedent suggests that laws can be found in violation of the dormant Commerce Clause if they require parties to have a *presence* in the state—irrespective of where the parties may be legally residents. *Granholm v. Heald*, 544 U.S. 460, 475 (2005) (finding a New York liquor law violated the dormant Commerce Clause because it required wineries to establish in-state presence to ship to consumers). In *Lewis v. BT Investment Managers, Inc.*, the Supreme Court considered a Florida statute which prohibited any bank not chartered by the state of Florida from doing certain business within the state. 447 U.S. 27, 31 (1980). The Court found the law unconstitutional not because it discriminated against non-*resident* banks, but because it discriminated against banks with minimal "*contacts with the local economy*." *Id*. at 42 (emphasis added). By drawing this distinction, the Supreme Court established that the crux of dormant Commerce Clause analysis lies not with where the regulated parties are legally residents, but with where they primarily do business.

The Circuit Courts of Appeals have been even more specific: in *NextEra Energy Capital Holdings, Inc. v. Lake*, the Fifth Circuit considered precisely the kind of state ROFR for incumbent electricity transmissions at issue in the present case. 48 F.4th 306 (5th Cir. 2022). In *NextEra,* the court ruled that a Texas law that granted incumbent energy producers an ROFR on new transmission facilities violated the dormant Commerce Clause despite the fact that many of the incumbent providers were technically headquartered outside of Texas. *Id*. at 324. The Fifth Circuit decidedly found that "local presence, rather than place of incorporation, should matter" in dormant Commerce Clause cases. *Id*. at 323. The Eleventh and First Circuits also concur in this matter. *See Florida Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012) (finding that predicating Dormant Commerce Clause analysis on place of incorporation would make the dormant Commerce Clause "turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place"); *Walgreen Co. v. Rullan*, 405 F.3d 50, 58-59 (1st Cir. 2005) (finding a Puerto Rico law unconstitutional under the dormant Commerce Clause because "the vast majority" of companies favored by the law were "local concerns").

Vandalia's ROFR is clearly facially discriminatory because it favors local power transmitters over nonlocal ones. The ROFR is nearly identical to the one struck down in *NextEra*, with both laws blocking the entrance of out-of-state power transmitters into the local market: like Texas's ROFR, Vandalia's ROFR limits the construction of new power transmissions lines to incumbent electric transmission owners only. Likewise, Vandalia's ROFR violates the dormant Commerce Clause the same as the law struck down in *NextEra* because it discriminates against interstate commerce by "requiring boots on the ground" in order to enter the local energy market. *NextEra*, 48 F.4th at 325.

Vandalia's ROFR is also comparable to the law struck down by the Supreme Court in *Lewis*, similarly requiring local presence in order to do business in the state. The Court's holding in *Lewis* that laws violate the dormant Commerce Clause if they "discriminate[] among affected business entities according to the extent of their contacts with the local economy" likewise applies here: like the out-of-state banks prohibited from doing business in Florida, ACES and other nonlocal electric transmitters are prohibited from doing business for over a year in Vandalia solely due to their lack of contacts with the local economy. *Lewis*, 447 U.S. at 42. Just as the Supreme Court held in *Lewis* that such discrimination based on lack of interaction with the local economy is unconstitutional, so too is it here.

Because precedent dictates dormant Commerce Clause analysis hinges on the place of primary activity that is prohibited or favored by the state law, Vandalia's ROFR is facially discriminatory since it discriminates against nonlocal electric transmission owners in favor of local ones. Therefore, the ROFR is *per se* unconstitutional under the dormant Commerce Clause.

2. Vandalia's facially discriminatory ROFR is *per se* unconstitutional because it does not advance a legitimate local interest and there are less discriminatory means available of achieving the ROFR's aims.

Since Vandalia's ROFR is facially discriminatory, this court should find the law *per se* unconstitutional because there are less discriminatory means of advancing the aims of the ROFR.

As discussed, a state law that is facially discriminatory is *per se* unconstitutional unless its proponents can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys., Inc. v. Dept. of Env'tal Quality of State of Or.*, 511 U.S. 93, 101 (1994). Such laws are subject to the "strictest scrutiny" that requires states to show that "nondiscriminatory alternatives will prove unworkable." *Id.*; *see also Granholm v. Heald*, 544 U.S. 460, 493 (2005).

Vandalia in the present case has not shown that the ROFR has no reasonable nondiscriminatory alternatives. Two justifications for Vandalia's ROFR have been provided: first, that the ROFR is necessary to keep transmission power in the hands of "more responsive" in-state companies; and second, to discourage third-party transmission companies from doing business in Vandalia. R. 9. Of these two justifications, the second is plainly protectionist and discriminates against non-incumbent power providers and will not survive strict scrutiny analysis. *West Lynn Creamer, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (holding that justifications for discriminatory laws must be "unrelated to economic protectionism").

The first justification for the ROFR—that incumbent power transmitters are "more responsive"—is equally untenable because responsiveness and reliability of the power supply in Vandalia can be achieved through less discriminatory means than completely barring non-incumbent power providers from the transmission market. Under Order 1000, states still retain significant authority to regulate power facilities in their jurisdiction. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 312 (2022) ("Order 1000 is consistent with the Federal Power Act in leaving room for state regulation"). Given the regulatory authority still granted to states, Vandalia could ensure the responsiveness and reliability of its power supply through other, non-discriminatory regulations, such as requiring an in-state point of contact or setting stringent contact and reporting standards for power companies. Vandalia's ROFR is an extreme response to a problem that could be solved through more careful forms of state regulation that run afoul of neither the dormant Commerce Clause nor Order 1000.

Because less discriminatory means of ensuring the responsiveness of Vandalia's power suppliers are available, the state's ROFR fails to satisfy the strict scrutiny analysis required of facially discriminatory state laws. Therefore, this court should invalidate Vandalia's ROFR as unconstitutional under the dormant Commerce Clause.

B. Vandalia's ROFR is unconstitutional under the Dormant Commerce Clause because its benefits do not outweigh the burdens on commerce.

Even if this court finds that Vandalia's ROFR is not facially discriminatory, this court should still find the ROFR unconstitutional under the dormant Commerce Clause because its benefits do not outweigh the burdens it places on interstate commerce.

The Supreme Court has held that laws that affect interstate commerce can still violate the dormant Commerce Clause even if they are not facially discriminatory and have a legitimate local purpose. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Such "evenhanded" laws can be struck down under the *Pike* balancing test if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id*.

The burdens an ROFR places on interstate commerce are significant. FERC has identified ROFRs as a major source of discrimination and unreasonable rates in electricity transmission. Order 1000 at ¶ 229. Furthermore, the exclusion of nonincumbent electricity transmitters in regional electricity planning reduces innovation and drives up the cost of both new transmission development and electricity rates. *Id.*; Order 1000 at ¶ 253 (noting that permitting ROFRs "undermine[s] the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs," which results in "unjust and unreasonable" rates). Given that Vandalia's power is connected to thirteen other states and the District of Columbia, *see* R. 3, these roadblocks caused by an ROFR would have a significant burden on interstate commerce.

On the other hand, the local benefits of an ROFR are insubstantial. Proponents of Vandalia's ROFR argue that such a law preserves the status quo and keeps electricity transmission in the hands of "more responsive" providers. R. 9. As identified by FERC, however, this concern holds little weight when safeguards already exist to ensure that selected electricity transmitters adequately provide for the area. *See* Order 1000 at ¶ 258 ("Public utility transmission providers are already required to evaluate whether alternative transmission solutions proposed by other developers better meet the needs of the region"). Furthermore, the competitive bid process proposed by the elimination of the ROFR does not prevent "more responsive" incumbent transmitters from being granted new projects; incumbent utilities providers are still “free to highlight [their] strengths,” such as their alleged greater responsiveness, in their bids for new transmission projects. Order 1000 at ¶ 260. The non-necessity of an ROFR to achieve the supposed local benefit diminishes the importance of such a benefit when compared to the burdens imposed by the law.

Since the benefit purportedly preserved by Vandalia’s ROFR—the preservation of more responsive power suppliers—can still be easily accomplished in the absence of an ROFR, the local benefit is clearly outweighed under the *Pike* balancing test. When compared with the significant burdens imposed by the law, the benefit conferred by Vandalia’s ROFR is inconsequential. Therefore, this court should find Vandalia’s ROFR unconstitutional under the dormant Commerce Clause.

CONCLUSION

Appalachian Clean Energy Solutions, Inc. respectfully requests that this court reverse the district court’s grant of summary judgment for all claims. Appalachian Clean Energy Solutions requests that this court find instead that 1) ACES has standing to challenge the PSC’s Capacity Factor Order; 2) the Capacity Factor Order violates the Supremacy Clause; 3) Vandalia’s ROFR violates the Supremacy Clause; and 4) Vandalia’s ROFR violates the dormant Commerce Clause.

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. 24