No. 22-0682

# In the 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*,

COMMISSIONER EVELYN ELKINS, *IN HER OFFICIAL CAPACITY*,

*Appellee*.

*On Appeal from the United States District Court for the Northern District of Vandalia*

**BRIEF OF APPELLEE**

Team 5
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## JURISDICTIONAL STATEMENT

Appellant brings its claims under the Supremacy Clause, U.S. Const. art. VI, § 2, and the Commerce Clause, U.S. Const. art. I, § 8, of the United States Constitution. Thus, the district court had federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331. From the district's court's final judgment entered August 15, 2022, Appellant filed a timely notice of appeal on August 29, 2022, thereby giving this Court proper jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED

1. Does the Capacity Factor Order, which applies to retail companies and rates, give ACES sufficient merit to satisfy the constitutional standing requirements?
2. Assuming ACES has standing, does the Capacity Factor Order's directive to increase intrastate facility coal capacity impermissibly infringe upon the federal government's authority to regulate interstate wholesale rates?
3. Is Vandalia's right-of-first-refusal statute permissible under the Supremacy Clause pursuant to FERC Order 1000?
4. Does Vandalia's right-of-first-refusal statute pass Constitutional muster under the dormant Commerce Clause where the policy distinguishes between transmission line owners based on their incumbency status rather than their state of origin and is intended to ensure reliable utility service for the state's retail electricity consumers?

## STATEMENT OF THE CASE

### PJM, the Vandalia PSC, and Vandalia's Electricity Market

The American wholesale electricity market is regulated by the Federal Energy Regulatory Commission ("FERC"). R. at 3. Starting in 1996 with Order 888, and bolstered in 2000 with Order 2000, FERC has sought to promote fair access to the electricity transmission market by encouraging the creation of regional Independent System Operators (“ISOs”) and regional transmission organizations (“RTOs”). R. at 3. These ISO/RTOs approve new transmission facility construction and operate energy and capacity markets, while states retain “traditional authority over siting, routing, and permitting” of the facilities. R. at 3. The PJM Interconnection (“PJM”), is the ISO/RTO serving the mid-Atlantic region, including Vandalia. R. at 3.

Vandalia plays a critical role in the PJM electricity market as a net supplier of electricity to the regional grid; in fact, only four states across the U.S. export more electricity out of state. R. at 4. This is due to Vandalia’s large coal deposits, which for decades made coal the state’s biggest industry. R. at 4. Even today, coal plays a “prominent role” in the state’s economic and political life. R. at 4. Vandalia’s retail electricity market consists of two utility companies, LastEnergy and Mid-Atlantic Power Co. (“MAPCo”). R. at 4. The companies are based in Ohio and provide electricity to consumers across multiple midwestern and mid-Atlantic states. R. at 4. Both companies operate coal-fired power plants in Vandalia. R. at 4.

Within Vandalia itself, utility rates and policies are regulated by the Vandalia Public Service Commission (“PSC”). R. at 6. Led by three commissioners appointed by the Governor, the Vandalia legislature has granted PSC a “broad grant of authority” to set “just and reasonable” utility rates. R. at 6; Vand. Code § 24-2-3. Further, PSC is tasked with “provid[ing] the availability of adequate, economical and reliable utility services.” Vand. Code § 24-1-1(a)(2).

**The Capacity Factor Order**

Beyond its basic mandate to regulate utility rates and ensure reliable service, the PSC is tasked with maintaining the coal industry’s critical place in Vandalia’s economy and society. R. at 6. Specifically, the agency must “[e]ncourage the well-planned development of utility resources in a manner . . . consistent with the productive use of the state’s energy resources, such as coal,” and must "take immediate steps to reverse these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close [and] no additional jobs are lost." Vand. Code § 24-1-1(a)(3); *Id.* § 24-1-1D(5). "Public electric utilities in Vandalia should be encouraged to operate their coal-fired plants at maximum reasonable output and for the duration of the life of the plants." *Id.* § 24-1-1D(12). These policies were passed in response to a reduction in coal capacity by both of Vandalia's electricity utility companies, who had been "displacing" coal generation for other sources of energy. R. at 7.

To reverse this trend, the PSC issued its Capacity Factor Order ("CFO") on May 15, 2022. R. at 7. Decrying "unacceptably low" capacity factors at Vandalia's coal plants, the CFO ordered LastEnergy and MAPCo to "operate their coal-fired plants to achieve a capacity factor of not less than 75 percent, as measured over a calendar year." R. at 8. The CFO also included "a finding of fact that operation of the jurisdictional coal-fired plants at a 75 percent capacity factor would be economical," and established a cost recovery mechanism in the event production costs exceeded the market-clearing price. R. at 8.

**The Right of First Refusal**

Just as trends in electricity production required the PSC to issue the CFO, potentially disruptive trends in national electricity regulation spurred the Vandalia legislature to enact a right-of-first-refusal ("ROFR") policy. Until 2011, ROFR provisions, which gave existing transmission facility owners "exclusive right to construct new transmission facilities," were common within FERC-approved ISOs. R. at 9. This changed with FERC Order 1000, which forced ISOs to eliminate their "federally recognized" ROFRs in order to allow open competition for new transmission projects. R. at 8.

Three years later, the Vandalia legislature heard testimony that restoring the "'status quo' from before Order 1000" was "necessary to keep transmission lines in the hands of purportedly more responsive in-state companies." R. at 9. This caused the state legislature to enact its own ROFR policy with the 2014 Native Transmission Protection Act. R. at 9. The law ensures that pre-existing Vandalia utility companies have "the first opportunity to invest in federal regionally planned transmission projects." R. at 9. Specifically, it provides that:

> An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. If such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

Vand. Code § 24-12.3(d). Further, the law defines an "incumbent electric transmission owner" as a "public utility" which already "owns, operates, and maintains an electric transmission line" or other related "equipment or facilities" in Vandalia. Vand. Code § 24-12.2(f).

Notably, other states such as Minnesota, North Dakota, South Dakota, Nebraska, and Oklahoma have all enacted similar state ROFR policies in response to FERC Order 1000. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024 n.3 (8th Cir. 2020). Despite eliminating the federal ROFR, FERC has rejected challenges to these state ROFR policies, acknowledging that regional ISO/RTOs may "recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." *Midwest Indep. Transmission Sys. Operator*, 150 F.E.R.C. P61,037, 61176 (F.E.R.C. January 22, 2015). *See also Transmission Planning & Cost Allocation*, 2011 FERC LEXIS 1387, *316 (F.E.R.C. July 21, 2011) ("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.”).

**ACES’ Proposed Project**

The instant case centers around a global energy company, Appalachian Clean Energy Solutions (“ACES”), which “generates electricity solely for resale in the wholesale markets” and “has no retail electricity customers, nor does it own any retail electric utilities as part of its corporate structure.” R. at 4-5. The company engages in merchant electricity generation, including several power plants in the PJM, and also constructs and maintains electric transmission lines, though it does not currently maintain any within Vandalia. R. at 5.

As part of its recently adopted goal to achieve zero carbon emissions by 2050, ACES plans to take several steps to reduce its reliance on coal-fired power plants within PJM’s jurisdiction. R. at 5. This includes retiring a coal-fired plant in Ohio, opening a new natural gas-fired plant in Pennsylvania named the Rogersville Energy Facility, and making use of carbon capture and storage technology. R. at 5. ACES’s “generating plants” do not serve “‘captive’ retail customers and instead sell [their] output into the competitive wholesale markets.” R. at 5 n.3.

Further, as part of its plan to open a new gas-fired plant, ACES hopes to construct a 460-mile-long transmission line, called the Mountaineer Express, from Pennsylvania to North Carolina, running partially through Vandalia. R. at 5-6. PJM approved the Mountaineer Express in early 2022 as part of its Regional Transmission Expansion Plan (“RTEP”). R. at 6.

However, ACES still needs approval from the PSC to construct the Vandalia portions of the Express. R. at 10. Because ACES “owns no existing transmission facilities within Vandalia,” it is subject to the state ROFR’s 18-month wait period, during which time LastEnergy or MAPCo, as incumbent transmission lines owners, may exercise their right to construct and operate the line. R. at 9-10.

However, ACES sited segments of the line along the same rights of way used by LastEnergy and argued that this qualified it as a "public utility" not subject to the ROFR's waiting period. R. at 10-11. But the PSC disagreed and found that ACES is not a "public utility" under the Vandalia code but rather a "merchant power plant operator and merchant transmission line operator" whose services are provided, and would continue to be provided even if they complete the Mountaineer Express, "entirely in wholesale, not retail, markets." R. at 11. Per this order, ACES cannot claim LastEnergy's preexisting right of way as its own and is therefore a nonincumbent transmission owner subject to the ROFR policy. R. at 11.

**Procedural History**

On June 6, 2022, ACES brought suits against the PSC in federal court in the Northern District of Vandalia, challenging both the CFO and the ROFR policy. R. at 14-15. ACES aimed to strike down the CFO under the Supremacy Clause and to strike down the ROFR policy under either the Supremacy Clause or the dormant Commerce Clause. R. at 14-15. After the suits were filed, the PSC moved to dismiss all of ACES's claims. R. at 14-15.

About two months later, the district court granted PSC's motion to dismiss on all counts, holding that ACES lacked standing in its challenge of the CFO, that the CFO does not violate the Supremacy Clause, and that the ROFR does not violate the Supremacy Clause or the dormant Commerce Clause. R. at 15-16. ACES filed a timely appeal to the Twelfth Circuit, leading to the instant case. R. at 16.

## SUMMARY OF THE ARGUMENT

ACES fails to meet the requirements for standing because it lacks a concrete injury, and a favorable outcome is merely speculative. The CFO concerns retail service within Vandalia and does not apply to ACES because it works solely in the wholesale market. Additionally, the CFO permits a cost-recovery provision that may impact the retail ratepayer. ACES is not injured by this provision. Further, any alleged injury to the building and operating costs of their new facility is hypothetical. There is no factual support that shows ACES' costs are impacted by the CFO. As such, ACES cannot establish a concrete injury. Additionally, ACES cannot establish a likely favorable outcome necessary to meet the redressability standard. Even without the CFO, LastEnergy and MAPCo can operate at 75 percent capacity since there is a finding of fact it is economical to do so. It is merely speculative that the court can redress any alleged injury. Therefore, ACES does not have standing to bring this suit.

If ACES does have standing, its case still fails because the CFO is not preempted by FERC's authority. Express preemption occurs when Congress expressly states that a federal law intends to preempt state legislation. Congress did not expressly state FERC's authority under the Federal Power Act preempts state legislation so express preemption is not at issue regarding this matter. Field preemption occurs when federal law occupies an entire field of regulation. The Supreme Court has found that state legislation that is "tethered" to wholesale market participation and rate is field preempted. The CFO is not tethered to participation in wholesale market nor the wholesale rate. It increases the amount of energy supply to the grid and LastEnergy and MAPCo do not receive a separate rate from other market participants. Conflict preemption occurs when it is impossible for a party to comply with both state and federal law or when state law poses an obstacle to federal regulatory goals. State legislation that indirectly affects the wholesale market is a legal exercise of state authority. The CFO's instruction to increase electricity supply only indirectly affects the wholesale market. Therefore, the CFO is not conflict preempted and is lawful legislation.

Vandalia's statutory ROFR is not preempted by FERC Order 1000 under the Supremacy Clause of the Constitution. In establishing Order 1000, FERC never expressed that it intended to preempt state ROFRs and in fact, explicitly stated its intention *not* to conflict with state law, thus there is no express preemption. Additionally, there is no field preemption because even though the federal government typically regulates matters concerning energy, the ROFR involves siting and constructing of transmission lines, which is typically overseen by the states. Vandalia's ROFR does not conflict with Order 1000, nor does it prevent the furtherance of the objectives stated in Order 1000, so there is no conflict preemption. Furthermore, many other states have enacted ROFRs that have been upheld in court.

Vandalia's ROFR complies with the dormant Commerce Clause for several reasons. First, the policy does not implicate the dormant Commerce Clause at all because ACES and Vandalia's incumbent utilities are not similarly situated within the state's electricity market. Second, even if the clause is implicated by the ROFR, it does not discriminate against out-of-state interests because it only distinguishes between incumbent and nonincumbent utilities, regardless of their home state. Additionally, the ROFR does not have a discriminatory purpose because it is merely intended to maintain reliable electricity service for Vandalia's residents, nor are its effects discriminatory because the favored incumbent utilities are not incorporated in Vandalia. Finally, the ROFR's incidental effects on interstate commerce are justified under the *Pike* test because they are minimally burdensome and do not outweigh the benefit of maintaining a stable and reliable status quo in Vandalia's utility regulation scheme.

## ARGUMENT

The United States Supreme Court has established that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Appellant in this case, ACES, defies this affirmation of the states' right to regulate utilities by challenging two of Vandalia's crucial electricity regulatory policies. These policies are necessary both to protect the state's most important industry and to maintain a time-tested system that ensures reliable electricity service for Vandalia residents, and both policies do so without unconstitutionally burdening ACES. Because ACES has failed to meet its burden in both of its challenges, this court should affirm the district court's dismissal of this case.

Under the Federal Rules of Procedure, a party may move to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When considering a motion to dismiss, "a court assumes all facts in the complaint to be true and construes all reasonable inferences most favorably to the complainant." *U.S. ex rel. Raynor v. Nat'l Rural Utils. Coop. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012). An appellate court reviews appeals of Rule 12(b)(6) dismissals de novo. *LSP Transmission Holdings*, 954 F.3d at 1026.

### I. ACES cannot establish standing because it did not suffer a concrete nor redressable injury.

To have standing, a party must meet three elements: an injury, causal connection, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "injury in fact" must be (a) concrete and particularized, and (b) actual or imminent. *Id.* This amounts to more than a generalized grievance. *Id*. at 574. To be concrete, the alleged injury must be "de facto" and real.

*Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). To be particularized, the alleged injury "must affect the plaintiff in a personal and individual way." *Id*. at 339. The causal connection must be traceable to the action of the defendant. *Lujan*, 504 U.S. at 560. To meet the redressability element, it must be "likely" that the injury will be "redressed by a favorable decision." *Id*. at 561.

ACES does not have standing to sue because the injury is hypothetical and the redressability is speculative. As an initial matter, the CFO does not apply to ACES. The Vandalia PSC is charged with regulating rates and practices of utilities providing retail service within Vandalia. ACES works solely in the wholesale market, therefore the CFO is not directed at ACES. R. at 4.

In the event production cost exceeds the market-clearing price, the CFO has a fail-safe provision that allows the companies to recover costs in retail rates if necessary. R. at 7. ACES is not impacted by this either since it is not a ratepayer. If it becomes necessary for the companies to collect cost recovery, the additional cost is spread among the hundreds of thousands of ratepayers. Since ACES only provides services through the wholesale market, the cost-recovery provision is not applicable to ACES.

The potential injury ACES alleges would be that the CFO impacts the building and operating of the Rogersville Energy Facility. Despite announcing plans for the facility in April 2020, ACES is modifying the design to take advantage of the 45Q federal tax credit. R. at 5. This announced modification was made in September 2022, five months after the PSC adopted the CFO. R. at 5.

The alleged injury is not concrete. There is a finding of fact that it is economical for the intrastate coal-fired plants to run at 75 percent capacity. R. at 8. While this provides more competition for ACES, it is illusory how the CFO affects the building and operating of the new facility. The CFO simply provides more coal-fired energy generation. The building costs of the new facility are related to the modifications of the building to comply with the 45Q federal tax credit. The operating costs are unknown, and there is no factual evidence of the effect of higher coal capacity on ACES's costs. It is entirely hypothetical and attenuated that higher coal capacity would increase their costs. Therefore, ACES does not have standing because the injury is hypothetical and not concrete.

Even if there was an injury, ACES lacks standing because it is not likely the alleged injury is redressable by a favorable decision; it is too speculative. A favorable decision for ACES by the court would render the CFO null and void. Without the CFO, LastEnergy and MAPCo may decide to operate at 75 percent capacity regardless. There is a finding of fact that operating the coal-fired plants at 75 percent is economical, proving it is a sound business judgment to operate at 75 percent capacity independently of the CFO. It is not likely that the alleged injury is redressable.

## II. The PSC's Capacity Factor Order permissibly regulates power generation and retail rates and therefore is not preempted by FERC's authority under the Federal Power Act.

There are two main types of preemption: express and implied. *Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983). Express preemption occurs when Congress expressly states that a federal law intends to preempt state legislation. *Hillsborough County v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 713 (1985). The Federal Power Act explicitly preserves states' authority to regulate retail electricity sales and in-state generation facilities. 16 U.S.C. § 824(b)(1) (2018). Pursuant to 16 U.S.C. § 824 and under the facts of this case, express preemption is not applicable.

There are two types of implied preemption: field and conflict. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Field preemption occurs when federal law occupies an entire field of regulation so as to leave "no room for States to supplement it." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018). Conflict preemption can occur under two circumstances. *United States v. Locke*, 529 U.S. 89, 109 (2000). One circumstance is when it is impossible for a party to comply with both state and federal law. *Id.* The other circumstance occurs when the state law poses an obstacle to Congress' regulatory goals. *Id*. The CFO is not preempted by federal law because it is lawfully under the state's jurisdiction of energy production and does not impede federal wholesale regulatory goals.

### A. <u>The Capacity Factor Order is not field preempted because it is "untethered" to wholesale market participation.</u>

ACES contends that the CFO is preempted because it infringes upon FERC's regulatory authority to set interstate wholesale rates. The CFO does not effectively set the wholesale rates for LastEnergy or MAPCo. In *Hughes v. Talen Energy Mktg., LLC*, Maryland created a regulatory program that required utility companies to enter into a 20-year pricing contract with an electric generation company. 578 U.S. 150, 158 (2016). Under the contract, the electric generation company would sell its capacity into the PJM market, not directly to the utility companies. *Id*. at 159. If the clearing price was below the contract price, the utility companies would pay the electric generation company the difference. *Id*. If the clearing price exceeded the contract price, the electric generation company would pay the utility companies the difference. *Id.* As such, the electric generation company effectively received the contracted price, not the clearing price set by FERC. *Id*. at 159 n.5. The Supreme Court invalidated the Maryland program because it disregarded the wholesale rate required by FERC. *Id*. at 164.

The Supreme Court expressly opined that "[n]othing in this opinion should be read to foreclose . . . [s]tates from encouraging production . . . through measures 'untethered to a generator's wholesale market participation.'" *Id*. at 166. This narrow "tethering" test suggests states may still regulate areas incidental to FERC's authority.[1]

The CFO does not tether LastEnergy and MAPCo to its participation and clearing of interstate wholesale auctions. The CFO directs LastEnergy and MAPCo to operate their intrastate coal-fired plants at 75 percent capacity. The companies can recover costs in retail rates if the cost to produce electricity is greater than the market clearing price. This is entirely different from Maryland's program in *Hughes*. The CFO does not disregard the wholesale rate set at auction, it merely directs two companies already participating in the wholesale market to increase coal-fired capacity to 75 percent, which the commission found to be economical. It also accomplishes the State's interest in regulating its most valuable resource. Neither electric generation company will receive a different wholesale price than other participating companies.

Furthermore, there is no separate monetary exchange between the electric generation company and the utility company. Any cost-recovery, if necessary, is imputed upon the retail customers. This does not infringe upon FERC's authority regarding interstate wholesale prices. The states maintain the power to regulate retail sales of electricity. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266-67 (2016). Therefore, *Hughes* does not control because the CFO is untethered to participation and clearing the wholesale market.

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[1] *See* Phillip N. Killeen, *Comment: FERC's Tether Tantrum: Why Suppressing State Support for Renewable Energy Violates the Federal Power Act and Threatens U.S. Climate Leadership*, 70 Am. U.L. Rev. 271, 291 (2020).

**B. <u>The CFO's indirect effect on the wholesale market is lawfully under the State's authority to regulate and does not conflict with federal goals.</u>**

ACES asserts that the CFO distorts the PJM auction's price signals, thereby causing a less efficient market which conflicts with FERC's goals. One of FERC's goals is to ensure "economically efficient energy services at a reasonable cost."[2]

FERC's authority is limited to "ensure that rules or practices 'affecting' wholesale rates are just and reasonable." *Elec. Power*, 577 U.S. at 277. Since "affecting" can be unending, the Supreme Court limited FERC's jurisdiction to "rules or practices that 'directly affect the [wholesale] rate.'" *Id*. at 278 (quoting *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (7th. Cir. 2004)) (emphasis in original). FERC itself has recognized that state policy may have an incidental effect on the market clearing price. *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 56 (2d. Cir. 2018). Some policy programs include loans, subsidies, tax credits, and generator retirement or construction. *Id*. As FERC Commissioner Bay noted in 2017, "an idealized vision of markets free from the influence of public policies . . . does not exist." *N.Y. State PSC*, 158 FERC ¶ 61,137, 2017 WL 496267, at *11 (2017) (Bay, Comm'r, concurring). The Supreme Court further emphasizes this point in *Hughes*, holding a narrow ruling that "need not and do not address the permissibility of various other measures States might employ . . . including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Hughes*, 578 U.S. at 166.

In *Coalition for Competitive Elec. v. Zibelman*, New York enacted a Zero Emission Credit ("ZEC") policy that gave qualifying nuclear generators a credit based on its environmental impact.

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[2] Chairman Richard Glick, *Federal Energy Regulatory Commission Strategic Plan, Fiscal Years 2022-2026* (March 28, 2022), p. 7, https://www.ferc.gov/strategic-documents/strategic-plan.

906 F.3d at 45. The Second Circuit upheld the New York policy in part because the ZEC program only incidentally affected the wholesale price and therefore did not cause clear damage to federal goals. *Id*. at 57. It noted the programs "increas[ed] revenues for qualifying power plants, which in turn increas[ed] the supply of electricity, which in turn lower[ed] auction clearing prices [b]ut that is (at best) an incidental effect." *Id*.

The CFO clearly is a policy decision that only incidentally impacts wholesale price and does not conflict with federal goals. The PSC adopted the CFO believing higher coal capacity is in the public's best interest. CFO p 7. This policy directs LastEnergy and MAPCo to increase their coal-powered electric generation. This simply increases the amount of supply available, especially considering ACES is planning to retire its coal-fired power plant. The economics of increased supply may cause wholesale prices to decrease, but this incidental effect is wholly different from a regulation of interstate wholesale rates. *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 101 (2d. Cir. 2017). Simply because there is more electricity available in the wholesale market does not amount to a regulation of the wholesale market. Therefore, the CFO is valid. ACES's argument to the contrary should be rejected by this Court.

Lastly, Appellants assert the CFO is preempted because it compels coal-burning utilities to sell their energy into PJM. However, the CFO does not compel the sale of electricity in the wholesale market, but rather directs the increase of capacity factor to intrastate facilities. *See Allco*, 861 F.3d at 97 (compel and direct are not the same).

The coal-burning utilities sell their energy into PJM through their Fixed Resource Requirement ("FRR") status, not due to the CFO. As the facts show, all coal-fired power plants in Vandalia are "connected with and exclusively sell into PJM pursuant to their [FRR] status." R. at

8 n.7. The companies sold their energy generation into PJM before the CFO came into effect; and regardless of the CFO, the companies will continue to sell their energy in PJM.

### C. The district court correctly held the CFO resembled other state policies that courts have upheld as a proper authorization of state power.

As the district court noted, the Capacity Factor Order is akin to Zero Emission Credit ("ZEC") policies, which courts have held do not contravene FERC's authority. New York and Illinois enacted policies that established ZECs, which compensated in-state nuclear energy for emissions reductions.[3]

The policies were challenged in *New York in Coalition for Competitive Electricity v. Zibelman* and in Illinois in *Electric Power Supply Ass'n v. Star*. Both policies were upheld in the Second Circuit and Seventh Circuit respectively, since the ZEC policies satisfied the tethering test. Neither policy was tethered to participation in the wholesale market nor to wholesale prices.

Just like these programs, the CFO establishes the states' preferred method of energy production. The ZEC programs made it clear that renewable energy was the preferred method of generating electricity in New York and Illinois. Presently, the CFO makes it clear the preferred source is coal. Coal is vital to Vandalia's economy, and the national economy as well. The Order permissibly favors coal production and details that more coal production is better for the public interest and will be economical.

## III. Vandalia's statutory ROFR does not violate the Supremacy Clause of the U.S. Constitution.

The Supremacy Clause establishes that the federal constitution, as well as federal law, generally take precedence over state laws. U.S. Const. art. VI, § 2. However, historically, this

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[3] *See* Phillip N. Killeen, *Comment: FERC's Tether Tantrum: Why Suppressing State Support for Renewable Energy Violates the Federal Power Act and Threatens U.S. Climate Leadership*, 70 Am. U.L. Rev. 271, 292 (2020).

clause was not intended as a means to facilitate federal government overreach on state powers. Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 Geo. Wash. L. Rev. 91, 101 (2003). Rather, one of its purposes is to "prevent Congress from exceeding the scope of its enumerated powers." *Id*. Thus, when considering if a state law is preempted by a federal statute or regulation, courts typically assume state powers are not superseded by a federal act unless it is the clear purpose of said act. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Courts recognize express and implied preemption. *Gade*, 505 U.S. at 98. Vandalia's ROFR statute is not preempted under either express or implied preemption and therefore does not violate the Supremacy Clause.

### A. <u>Vandalia's ROFR is allowed under FERC Order 1000 and thus does not violate the Supremacy Clause.</u>

The purpose of FERC Order 1000 was to allow states to foster a more competitive environment if they wished to do so. *Transmission Planning & Cost Allocation*, 2011 FERC LEXIS 1387, *1 (F.E.R.C. July 21, 2011). However, just because a state *may* increase competition does not mean it *has* to. By eliminating the federal ROFR, FERC allowed states to decide the best course of action. *Id.* at *316. However, nothing in Order 1000 prevents states from enacting their own ROFR statutes, and for that reason, it is clear that there was no intention to preempt state laws.

#### 1. Vandalia's ROFR is not expressly preempted by Order 1000.

When a federal law explicitly states the intent to preempt, resolution of preemption-related disputes focuses on the scope of intended preemption. *Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251, 260 (2013). Here, there is no intention of preemption. Indeed, Order 1000 explicitly states that the removal of the federal ROFR refusal does not eliminate state ability to implement its own ROFR statutes. *Transmission Planning & Cost Allocation*, 2011 FERC LEXIS 1387, *316 (F.E.R.C. July 21, 2011) ("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."). If Congress intended for FERC to preempt state laws, it would have stated so. In fact, it would be required to do so.

**2. Vandalia's ROFR is not impliedly preempted by Order 1000.**

Even if a federal law does not state an explicit intent to preempt, a court may still decide that preemption applies if it is implied. *Gade*, 505 U.S. at 98. Here, neither field nor conflict preemption apply. It would be incorrect for this Court to determine that FERC impliedly preempted Vandalia's ROFR statute.

First, there is no field preemption. Field preemption can be inferred if Congress legislates within a field it intends to exclusively regulate. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). This occurs when Congress leaves "no room for the States to supplement" the law. *Rice*, 331 U.S. at 230. It can also refer to a field where "the Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of State laws on the same subject." *Id*. The core question in these cases is whether "Congress' intent to supersede state law altogether [can] be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (internal quotation marks omitted).

While it is true that energy is heavily regulated by Congress and federal agencies, Order 1000 clearly allows for the supplementation by state law. For example, the construction and siting of transmission facilities is traditionally within the State's regulatory authority. *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 312-13 (4th Cir. 2009). Even if a field is heavily or traditionally regulated by Congress, it does not mean that it automatically is preempted. If there is no intention to prevent States from supplementing the law, there is no field preemption. *Pacific Gas and Elec. Co.*, 461 U.S. at 203-04.

There is also no conflict preemption. This can occur when there is a conflict between state and federal laws. *Gade*, 505 U.S. at 98. It can also occur if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). When a state law directly conflicts with a federal law, courts may determine that there is conflict preemption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). In these circumstances, the interests of the federal government come before those of the state. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). Additionally, courts can also find conflict preemption when it is impossible for a private party to comply with both state and federal laws. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

ACES may attempt to argue that because Order 1000 removed the federal ROFR, that it was within FERC's purpose to preempt state ROFR, but that is simply not true. It is within traditional state jurisdiction to render decisions on permits for "the siting and construction of electric transmission facilities." *Piedmont Envtl. Council*, 558 F.3d at 310. Since Order 1000 was not intended to prevent states from enacting ROFRs, there is no conflict.

**3. Ruling in favor of federal preemption will have severe consequences on state powers.**

Whether a law is federally preempted is not a decision to be taken lightly. The Supreme Court has noted that when matters of law are not addressed by federal statute, it is presumably left to the state to supplement. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Order 1000 leaves room for state participation. To find that Vandalia's ROFR laws are unconstitutional would place limits on state powers that were not previously there. Because there are several other states that have enacted ROFRs in response to Order 1000, if this Court were to find that Vandalia's

ROFR is preempted, it opens the door for further litigation around the country. *See* statutes cited *infra* part III.B. With Order 1000, there was never any intention to limit state powers in this regard, and by litigating this matter, that is exactly what ACES is attempting to do. It is bigger than just Vandalia; it affects all states with ROFR statutes.

### B. Order 1000 does not prohibit states from enacting ROFR requirements.

Further working against ACES is the fact that Order 1000 explicitly states that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations," meaning that there is no ambiguity as to whether Vandalia's ROFR statute is allowable. *Transmission Planning & Cost Allocation*, 2011 FERC LEXIS 1387, *242-243 (F.E.R.C. July 21, 2011). The Order could not be clearer: its regulations are only limited to federal ROFR statutes.

In fact, since the enactment of Order 1000 in 2011, multiple states, such as Alabama, Iowa, Minnesota, Montana, and Oklahoma enacted ROFR requirements for electric transmission. *See* Ala. Code § 37-4-150(e) (2015); Iowa Code § 478.16(3) (2020); Minn. Stat. § 216.246 (2012); Mont. Code § 69-5-202 (2017); 17 O.K. Stat. § 292 (2013). These statutes are similar to that of Vandalia and have faced no opposition by FERC. Additionally, challenges to state ROFR statutes in court have largely been disregarded.

An exception is *NextEra Energy Capital Holdings, Inc. v. Lake*, in which the Fifth Circuit ruled against the state ROFR. 48 F.4th 306, 309 (5th Cir. 2022). That case involved a Texas statute that essentially banned out of state companies from entering the energy transmission market. *Id*. at 310. However, that case is distinguishable. The Texas statute is not a true ROFR statute because it is essentially a complete ban on competition. It only allowed new transmission lines which connect to an existing facility to be built by the owner of said facility. *Id*. The only way an out-of-state company could build in Texas would be to buy an already existing utility. *Id*. at 314.

As the 5th Circuit discussed, no state that enacted ROFR laws completely barred out-of-state competition. *Id*. In contrast to Texas, Vandalia has a time limit of eighteen months for incumbents to exercise their ROFR. Vand. Code § 24-12.3(d) (2014). Unlike Texas, Vandalia does allow out-of-state competition in the energy transmission market. While Vandalia's eighteen-month time limit is longer than the ninety days that is typical, it is not so unacceptable as to render it unconstitutional. *See* N.D. Cent. Code § 49-03-02(2) (2013) (this North Dakota statute is still in effect and has no time limit as to when the ROFR can be asserted).

### IV. Vandalia's ROFR comports with the dormant Commerce Clause because it does not discriminate against or unjustly burden interstate commerce.

Finally, ACES also fails in its dormant Commerce Clause challenge of the Vandalia ROFR because the policy does not discriminate or unjustly burden interstate commerce. Rather, the statute is the Vandalia legislature's reasonable attempt to maintain a stable utility regulation status quo that has long ensured that Vandalia's residents have reliable and affordable electricity service.

The dormant Commerce Clause, as the "negative" aspect of the Commerce Clause, "denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). This negative inference gives voice to the Framers' desire "to avoid the tendencies towards economic Balkanization that had plagued relations" between the colonies, and later the states, before the Constitution was enacted. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

However, the dormant Commerce Clause's reach into state policy is not endless, "for the Framers' distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy." *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338 (2008). In today's global, interconnected economy, there are few state regulations that can completely avoid interaction with interstate commerce. In order to violate the dormant Commerce Clause, a state regulation must go beyond merely impacting a particular economic actor's profits and actually block or burden the national market itself. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) ("[T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

Therefore, the party challenging a state policy carries "the burden to show [that] discrimination" against out-of-state interests rises to an unconstitutional level. *Hughes v. Oklahoma*, 441 U.S. at 336. ACES has failed to meet this burden for three reasons. First, under *G.M.C. v. Tracy*, the Vandalia ROFR does not implicate the dormant Commerce Clause at all because ACES and the favored incumbent utilities are not similarly situated within Vandalia's utilities market. Second, even if there is a dormant Commerce Clause issue, the ROFR does not discriminate against out-of-state interests because it only distinguishes between incumbent and nonincumbent entities. Lastly, the ROFR's incidental effects on interstate commerce are justified under the *Pike* test because they minimally burden out-of-state commerce in order to pursue Vandalia's interest in maintaining reliable utility service for its residents.

### A. <u>Vandalia's ROFR statute does not implicate the dormant Commerce Clause because ACES and the incumbent utilities are not similarly situated.</u>

In *General Motors Corp. v. Tracy*, the Supreme Court held that dormant Commerce Clause challenges predicated on discrimination against interstate entities "assume[] a comparison of substantially similar entities." 519 U.S. 278, 298 (1997). Therefore, before its challenge can even be considered, a plaintiff like ACES must first establish that it and the companies that allegedly receive preferential treatment "are indeed similarly situated for constitutional purposes." *Id*. at 299. Eliminating disparate treatment between companies that "serve different markets . . . would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition." *Id*.

The *Tracy* Court applied this standard by considering the nature of the natural gas market at issue in the case. The plaintiff, General Motors, challenged an Ohio law that exempted local retail gas distributors from sales tax, but not the out-of-state "marketers" from whom General Motors purchased most of their gas. *Id*. at 285. In dismissing General Motors' claim, the Court noted that Ohio effectively had two separate natural gas markets: a captive retail market that must purchase from an untaxed utility monopoly composed only of retail distributors, and a noncaptive market of larger buyers, where taxed marketers and untaxed utilities compete. *Id*. at 303. Noting that the captive market of households and small users was less robust than the noncaptive market of large-scale commercial gas users, the Court gave "controlling significance to the captive market." *Id.* at 303-04. Because there is no competition between in-state and out-of-state entities within the captive market, the dormant Commerce Clause had "no job to do" there. *Id.* at 303. The Court specifically credited its hesitance to intervene to a fear that doing so "might jeopardized [the local utility company's] continuing capacity." *Id*. at 305.

Here, the *Tracy* Court's logic neatly applies to Vandalia's electricity markets and ACES' position within them. The Vandalia PSC recently ruled that ACES is not a "public utility" under Vandalia statute but rather a "merchant power plant operator and merchant transmission line operator" whose services are provided, and would continue to be provided even if they complete the Mountaineer Express, "entirely in wholesale, not retail, markets." R. at 11. In fact, "ACES has no retail electricity customers, nor does it own any retail electric utilities as part of its corporate structure." R. at 4; see also R. at 5 n. 3 ("The generating plants owned and operated by ACES . . . [have] no 'captive' retail customers and instead sell[ their] output into the competitive wholesale markets."). Because only LastEnergy and MAPCo serve Vandalia retail markets, R. at 4, they are not situated similarly to ACES and "the dormant Commerce clause has no job to do" in mediating conflict between them. *Tracy*, 519 U.S. at 303.

It is true that ACES competes with LastEnergy and MAPCo in the building of transmission lines. However, just as the *Tracy* Court afforded "controlling significance" to the captive natural gas market, *Id*. at 303, this Court should give controlling significance to Vandalia's captive retail electricity market. The retail electricity consumers of Vandalia – households and small electricity users – are no less vulnerable to judicial disruption of the status quo than Ohio's retail natural gas consumers. When faced with its own choice between favoring a vulnerable captive market or a professional and robust noncaptive market, the *Tracy* Court warned of "the risk of weakening or destroying a regulatory scheme of public service and protection." *Id*. at 309.

This Court should heed the *Tracy* Court's warning and defer to the Vandalia legislature and PSC's judgment on how to best maintain stable, reliable electric service to Vandalia's residents.

**B. <u>Vandalia's ROFR does not discriminate against out-of-state interests because it only distinguishes between incumbent and nonincumbent transmission line operators.</u>**

Even if this Court declines to apply the *Tracy* reasoning to this case, Vandalia's ROFR still does not violate the dormant Commerce Clause because it does not discriminate against out-of-state interests on its face, in its purpose, or in its effect. As the "'negative' aspect" of the Commerce Clause, the dormant Commerce Clause forbids states from engaging in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99. This differential treatment may be discriminatory on its face, in its purpose, or its effect. *See Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 344 n.6 (1992).

In *LSP Transmission Holdings*, the Eighth Circuit considered whether Minnesota's own ROFR statute, which uses almost identical language as Vandalia's, discriminated against interstate commerce. 954 F.3d at 1024. There, a nonincumbent, out-of-state transmission company also challenged the state's ROFR law under the dormant Commerce Clause. *Id*. at 1024. The court ultimately agreed with the district court that the policy did not discriminate against out-of-state interests because it merely drew "a neutral distinction between existing electric transmission owners . . . and all other entities, regardless of whether they are in-state or out-of-state." *Id*. at 1027 (citation omitted). Here, Vandalia's ROFR statute, which is functionally identical to Minnesota's, is similarly nondiscriminatory on its face, in its purpose, and in its effect.

First, the ROFR statute does not facially discriminate against out-of-state companies; in fact, the text concerns only "incumbent electric transmission owner[s]" and makes no reference to where those owners are based or where they do most of their business. Vand. Code § 24-12.3(d). Incumbent owners are defined in the statute as a public utility which already "owns, operates, and maintains an electric transmission line" or other related "equipment or facilities" in Vandalia. Vand. Code § 24-12.2(f). Like the Minnesota ROFR in *LSP Transmission Holdings*, the Vandalia statute's preference for "transmission owners who have existing facilities . . . applies evenhandedly to all entities, regardless of" where they are based. 954 F.3d at 1028. Therefore, the ROFR statute is not facially discriminatory for dormant Commerce Clause purposes.

Additionally, Vandalia's ROFR has the legitimate, nondiscriminatory purpose of maintaining Vandalia's stable electricity supply status quo in the face of potentially disruptive federal deregulation. The *LSP* court, using the Minnesota ROFR's legislative history and the history of Minnesota's utility market, found that the statute was enacted in order to maintain the reliable electric services and reasonable rates long ensured by a stable regulatory system. 954 F.3d at 1029. Further noting that FERC has left much of transmission regulation to the states, the court concluded that this purpose was not discriminatory. *Id*. at 1030.

Further, the *LSP* court's holding is in line with the Supreme Court's frequent recognition of states' broad power to ensure their regulations serve consumers, which often leads it to avoid disrupting state regulatory schemes. *See, e.g.*, *Davis*, 553 U.S. at 356 ("[T]he fact that the system has been in force for a very long time is of itself a strong reason . . . for leaving any improvement that may be desired to the legislature.") (citation omitted); *Tracy*, 519 U.S. at 309 ("Prudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection."); *Ark. Elec. Coop. Corp.*, 461 U.S. at 377 ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.").

Here, the legislative history of Vandalia's ROFR statute reveals an intent to "restore the 'status quo' from before [FERC] Order 1000." R. at 9. Vandalia legislators were highly concerned about FERC's sudden removal of the longstanding federal ROFR and the impact this could have on the reliability of the state's electrical infrastructure. The state ROFR was motivated not by a desire to privilege in-state transmission owners, but merely to ensure stable electric supply through time-tested and reliable regulatory practices. This Court should follow the generally cautious guidance of the Supreme Court and, like the *LSP* court, hold that such a purpose is legitimate and nondiscriminatory.

Additionally, Vandalia's ROFR does not discriminate against out-of-state interests in its effects. ACES claims that Vandalia's regulation has the effect of disfavoring out-of-state transmission owners, but the two incumbent utilities, LastEnery and MAPCo, are headquartered and incorporated in Ohio, and both serve customers in many states besides Vandalia. R. at 4. Moreover, under the policy, a nonincumbent Vandalia-based company seeking to construct new transmission lines in Vandalia would be subject to the same 18-month waiting period as ACES. R. at 9. It is true that ACES is not incorporated in Vandalia and, as a nonincumbent, is disfavored by the statute, but "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon,* 437 U.S. at 126. Vandalia's ROFR favors incumbent transmission owners, regardless of their state of origin, and therefore does not have a discriminatory effect on interstate commerce.

### C. **Vandalia's ROFR satisfies the *Pike* balancing test because its effects on interstate are minimal and the policy ensures reliable electricity service.**

Not only does Vandalia's ROFR not discriminate against out-of-state interests, but any incidental effects it has on interstate commerce are minimal and the policy significantly benefits the state by maintaining a stable regulatory scheme. Under the *Pike* balancing test, laws that have a merely "incidental" effect on interstate commerce in their pursuit of "a legitimate local public interest" are upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

Notably, "the Supreme Court has rarely invoked *Pike* balancing to invalidate state regulation under the Commerce Clause." *Southern Union Co. v. Missouri PSC*, 289 F.3d 503, 509 (8th Cir. 2002) (holding that a Missouri regulation that allegedly burdened only out-of-state stock transactions did not violate the dormant Commerce Clause). *See also Davis*, 553 U.S. at 356 (cautioning against an "invitation to the adventurism of overturning a traditional local . . . practice" on dormant Commerce Clause grounds). Nondiscriminatory laws are only struck down if they "undermined a compelling need for national uniformity in regulation." *Tracy*, 519 at 298 n. 12.

Here, the local benefits of Vandalia's ROFR far exceed the minimal burden it places on interstate commerce. The Supreme Court has long established that maintaining stable and reliable utility service for consumers through the retention of traditional regulatory schemes is a legitimate interest well within the scope of state power. *See, e.g., Tracy,* 519 U.S. at 309 ("Prudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress despite its noncompetitive, monopolistic character."); *Ark. Elec. Coop. Corp.*, 461 U.S. at 377 ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.").

Further, the incidental burden that the ROFR places on interstate commerce is minimal. ACES claims that the 18-month period it must wait for incumbent utilities to take up their ROFR is overly burdensome. However, this is merely the amount of time necessary for incumbent utilities to consider the transmission line project as determined by the Vandalia legislature and PSC. The law would certainly be overly burdensome if it gave incumbent utilities an unlimited right to new transmission lines, as the Fifth Circuit held when striking down Texas' own ROFR statute, which had no time limit. *NextEra*, 48 F.4th at 314. But here, Vandalia's ROFR is only as burdensome as necessary to ensure there is an opportunity to maintain regulatory stability for the sake of ensuring reliable service for consumers.

Nor does Vandalia's ROFR risk interfering with "a compelling need for national uniformity in regulation." Tracy, 519 at 298 n. 12. FERC, despite its revocation of the federal ROFR, has explicitly decided to not dispute state-level ROFR laws. *Midwest Indep. Transmission Sys. Operator*, 150 F.E.R.C. P61,037, 61176 (F.E.R.C. January 22, 2015) (holding that regional ISO/RTOs may "recognize state or local laws or regulations as a threshold matter in the regional transmission planning process"). *Transmission Planning & Cost Allocation*, 2011 FERC LEXIS 1387, *316 (F.E.R.C. July 21, 2011) ("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.").

If the federal agency specifically tasked by Congress to enforce national uniformity in utilities regulations has determined that laws like Vandalia's ROFR do not threaten its mission, then there is no cause for courts to interfere. See *Allco*, 861 F.3d at 107 ("Congress and FERC are better-situated than the courts to supervise and to determine the economic wisdom and the health and safety effects of these geographic boundaries that Connecticut has incorporated into its RPS program."). Further, as the *LSP* court noted, "from an aggregate standpoint, this record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely." 954 F.3d at 1031.

Because Vandalia's ROFR furthers the state's interest in maintaining stable and reliable electrical infrastructure while minimally burdening ACES and posing no risk to national uniformity in utility regulations, it passes the *Pike* test and does not violate the dormant Commerce Clause.

## CONCLUSION

For the foregoing reasons, we ask that this Court find that the district court properly dismissed the suit by ACES on all issues.

___Team 5____________
Counsel for the Defendant-Appellee

## CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Vandalia PSC 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. 5