C.A. 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, and

COMMISSIONER EVELYN ELKINS,
in her official capacity,
Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT OF VANDALIA

BRIEF FOR THE APPELLEE

Team 30
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

This case involves an appeal by Appalachian Clean Energy Solutions, Inc. ("ACES") from the United States District Court for the Northern District of Vandalia. [R. 2]. The District Court had original subject matter jurisdiction pursuant to 28 U.S.C. §1331 federal question jurisdiction because ACES's claims against the Vandalia PSC arise under the Supremacy Clause and Commerce Clause of the Constitution of the United States. [R. 2]. This court has jurisdiction pursuant to 28 U.S.C. §1291 as the order dismissing all issues is the final judgement of a U.S. District Court. [R. 2, 16]. ACES filed suit against the Vandalia PSC on June 6, 2022, and the PSC moved to dismiss all claims on June 27, 2022. [R. 14-16]. The District Court granted the PSC's motion to dismiss on all issues on August 15, 2022, and ACES filed a timely appeal of the order on August 29, 2022. [R. 29].

STATEMENT OF ISSUES PRESENTED

I. Whether ACES has standing to challenge the PSC's Capacity Factor Order when it is not subjected to the Order and is not a ratepayer affected by the Order.

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

III. Whether Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000.

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

STATEMENT OF THE CASE

I. Capacity Factor Litigation

A. FPA and FERC Authority

In 1935, Congress enacted the Federal Power Act ("FPA") which now charges FERC to undertake in creating "effective federal regulation of the expanding business of transmitting and selling electrical power in interstate commerce." *New York v. FERC*, 535 U.S. 1, 6 (2002). This includes regulating wholesale electricity rates in interstate commerce. *See* 16 U.S.C. § 824(b)(1). Furthermore, FERC is responsible with determining whether a rate is "just and reasonable." *See* 16 U.S.C. § 824e(a). However, States have exclusive jurisdiction over generation facilities used for electric energy, which includes production and retail sales within their borders. 16 U.S.C. § 824(b)(1). FERC regulates electricity sales at wholesale and ensures "just and reasonable" rates through competition. *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536. FERC regulates these competitions to ensure an efficient market that produces a "just and reasonable" clearing prices. *See FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 268 (2016).

B. PJM Interconnection

Under FERC's Order 2000, transmission-owning utilities were required to participate in a regional transmission organization. ("RTO"). [R.3]. The RTO serving the mid-Atlantic region is the PJM Interconnection ("PJM"). [R.3]. The PJM is responsible with operating and maintaining the transmission grid in fourteen states and the District of Columbia. [R.3]. One of the states under the PJM is Vandalia. [R.3].

The PJM operates both energy and capacity markets within the region. [R.3]. The first market is the" energy market," which allows for an up to twenty-four-hour delivery of electricity.

[R.3]. The price for wholesale electricity is called the "market clearing price," which is determined by an auction. [R.3]. The cheaper resource will "clear" the market first, followed by the next cheapest option, and it will keep going until demand is met. [R.3]. When supply matches demand, the market is "cleared," and the last bid cleared becomes the "market-clearing price." [R.3].

The capacity market is a marketplace to supply for future demand. [R.3]. The PJM predicts demand three years in advance and assigns a share of demand to each participating load-serving entity in the region. [R.3]. Owners of the capacity bid into the auction for sale to the PPJM at rates the sellers set. PJM accepts bids until there is enough capacity to meet the anticipated demand. [R.3].

C. Coal Plants in Vandalia

Historically, Vandalia has been a rich state full of enormous coal deposits. [R.4]. Vandalia has a long and prosperous history with coal mining and generation. [R.4]. Even though the coal industries market-share has declined, coal still plays a prominent role in Vandalia's economy. [R.4]. In 2021, Vandalia was the third-largest coal producer in the nation. [R.4]. Additionally, in 2021, coal accounted for ninety-one percent of the total electricity generated in Vandalia. [R.4]. Vandalia is a net supplier of electricity to the regional grid, which means they export more electricity than they take in. [R.4].

Vandalia is served by two retail utility companies, LastEnergy and the Mid-Atlantic Power Co. ("MAPCo"). [R.4]. Last Energy operates two coal-fired plants in Vandalia, the Byrd Power Station (located in Fernwood) and the Fort William Power Station (located in Butler). [R.4]. MAPCo operates three coal-fired plants in Vandalia, the Ohio county plant (located in Hillsdale), the Robert Andy Power Plant (located in Leonard). [R. 4].

D. ACES

The Appalachian Clean Energy Solutions, Inc. ("ACES") is a global energy company which holds a large portfolio including coal-fired, natural gas-fired, nuclear plants, and renewable facilities in wind and solar. [R.4]. ACES solely sells their capacity in the wholesale market either through bilateral contracts or into a regional interconnection wholesale market. [R.4].

The ACES' plan to fully decarbonize and reach a zero-emission goal by 2050, they plan on closing there existing coal plants. [R.5]. ACES' Franklin Generating station in Pleasants County, Ohio is set to retire by the end of 2028 due to the guideline and standards the facility would need to abide by that are too uneconomic to occur. [R.5]. Upon this retirement, ACES has announced plans for new projects. [R.5].

In April of 2020, ACES' announced plans to construct a natural gas-fired generating plant and a high-voltage transmission line. [R.5]. The "Rogersville Energy Center" would be located in southwestern Pennsylvania using the natural gas supply from the Marcellus Shale. This plant would be designed with carbon capture and storage technology in order to take advantage of federal tax benefits. [R.5]. Upon Pennsylvania legislation establishing rules for carbon sequestration, the Rogersville Energy Center is estimated to cost $3.1 billion. [R.5].

The "Mountaineer Express," a the high-voltage line constructed by ACES from the Rogersville plant to Raleigh, North Carolina. [R.5]. This line compromises two-single circuit 500kV transmission lines capable to transmit up to 4,500 MW of power. [R.5]. The proposed line is estimated to cost $1.7 billion. [R.6]. The PJM implemented a competitive planning process to implement FERC Order 1000 to provide nonincumbent transmission developers an opportunity to participate in the planning and expansion of the system. [R.6]. Furthermore, the

PJM Board of Managers approved the Mountaineer Express for inclusion in to the Regional Transmission Expansion Plan ("RTEP") in March of 2022. [R.6].

E. Capacity Factor Order

The Vandalia Public Service Commission ("Vandalia PSC") is authorized as a state agency to govern the rates and practices of utilities proving retail rates within the state. [R.7]. The Vandalia PSC has the authority to set "just and reasonable rate" for the utilities subject to it's jurisdiction. *Vand. Code § 24-2-3;* [R.7].. Additionally, it is charged with regulating the practices, services, and rates of public utilities in order to deliver "adequate, economical and reliable utility services." *Vand. Code § 24-1-1(a)(2)*; [R.7].. Furthermore, they are tasked with encouraged with developing utility resources in a way puts Vandalia's coal into productive use. *Vand. Code § 24-1-1(a)(3); id. § 24-1-1D(5); id. § 24-1-1D(12)*; [R.7]. The State legislature goes on to encourage public utilities companies to "operate [] coal-fired plants at maximum reasonable output . . . for the duration of the life of the plants." [R.7].

The Vandalia PSC followed its orders from the State Legislature by enacting a Capacity Factor Order promote the desires of the legislature. [R.7-8]. Under the Capacity Factor Order, dated May 15, 2022, the PSC encourages coal-fired plants to operate at a minimum of seventy-five percent capacity factor. Capacity Factor Order, p. 7; [R.8]. To incentivize the capacity factor level, the Vandalia PSC created a cost-recovery incentive when the coal-fired facilities meet the desired capacity factor. [R.8]. The cost-recovery occurs when the cost of production is greater than the market-clearing price in the PJM. [R.8].

II. ROFR Litigation

A. Right of First Refusals for Transmission Line

In 2011, FERC issues Order 1000, requiring the removal federal ROFR provisions from FERC-approved tariffs. [R. 9]. In response in 2014, the Vandalia state legislature passed the Native Transmission Protection Act, aimed at maintaining the status quo in light of the removal of a standing federal ROFR. [R. 9]. The law provides a state statutory ROFR to incumbent utilities operating in Vandalia. [R. 9]. The statute specifically 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. [R. 9].

The stature further defines an "incumbent transmission owner" as:

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

The incumbent electric transmission entities currently are LastEnergy and MapCO, each of which are incorporated in Ohio, outside of Vandalia. [R. 16]. After the approval of Mountaineer Express and pursuant to the state ROFR, LastEnergy and MapCo have eighteen months to decide whether to exercise their ROFR. [R. 10]. The PJM board approved the Mountaineer Express in March of 2022, giving the incumbents until September 30, 2023, to make their ROFR decision. [R. 10].

B. ACES challenges to Vandalia's statute

ACES is not currently engaged in electricity transmission within Vandalia and does not qualify as an incumbent electric transmission owner under the Native Transmission Protection Act. [R. 9, 10]. ACES, similarly, as LastEnergy and MapCo, is incorporated outside of the State of Vandalia in West Virginia. [R. 16]. As a non-incumbent, under the Vandalia ROFR regime ACES must wait eighteen months to see if either LastEnergy or MapCO exercise their ROFR before the Vandalia PSC will take any action on ACES application for a certificate of public convenience for construction of portions of the Mountaineer Express within Vandalia. [R. 10, 15].

In the same complaint as the Capacity Factor Order challenge, ACES brought suit against the Vandalia PSC to challenge Vandalia's ROFR. [R. 15]. ACES brings two challenges against the Vandalia ROFR; first, that the FPA preempts Vandalia's ROFR and the state ROFR infringes on FERC's authority, and second, arguing that the state ROFR violates the dormant Commerce Clause of the Constitution. [R. 15]. ACES argues that the ROFR targets the competitive solicitation process and effectively nullifies FERC-set rates. [R. 15]. ACES additionally asserts that the Vandalia ROFR is "just like" a not-so-similar Texas statute recently invalidated by the Fifth Circuit. [R. 15]. Lastly, ACES contends that the eighteen-month waiting period imposed by the statute hinders market competition. [R. 15].

C. Lower Court's Ruling

Vandalia PSC filed a motion to dismiss on all issues on June 27, 2022. [R. 14]. On August 15, 2022, the United States District Court for the Northern District of Vandalia granted the PSC's motion to dismiss on all issues. [R. 16]. ACES filed a timely appeal of the order on

August 29, 2022. [R. 16]. This court ordered ACES and Vandalia PSC to brief all four issues on December 28, 2022. [R. 2].

SUMMARY OF THE ARGUMENT

Regulatory authority over the utility industry has a deep history involving a balance of state authority and FERC's federal authority, often requiring coordination between the two. This case presents two challenges which threaten this careful balance. First, the appellant asks this court to invalidate a state utility program it is not even subjected to and is not affected by. Second, the appellant asks this court to invalidate a state statutory ROFR despite FERC's express intention *not* to preempt states on this issue.

I. The Court is brought the question of whether ACES has met the Constitutional minimum for Article III standing to challenge the Capacity Factor Order. Per the jurisprudence on the matter, there is no standing when the injury alleged is merely theoretical. Additionally, and independently, when the requested relief will not remedy the harm, Article III standing fails.

II. Even if there is Article III standing, the Capacity Order is not preempted by the FPA under the Supremacy Clause since there is no "tether" to the wholesale market. The Capacity Factor Order fails to restrict the interstate wholesale market as the plaintiff alleges because: (1) there is no rate set by the Vandalia PSC which would fix rates and invade into FERC territory; and (2) the coal-facility's exclusive wholesales into the PJM interstate market occurs as a result of their FRR status, not as a result of the Capacity Order. Therefore, even if the Capacity Factor Order was silent (removing the "market-clearing price" as the differential value from the cost of production to find the subsidy amount), the result would still be the same.

III. FERC Order 1000 does not preempt Vandalia's statue statutory ROFR under the Supremacy Clause. As a federal agency, all authority FERC has comes directly

delegated from Congress. Only when FERC acts within its delegated authority does the agency preempt state law. The scope of the authority delegated to FERC through the FPA by Congress does not extend to areas of traditional state regulation such as siting and construction decisions relating to new transmission facilities. FERC does have exclusive and longstanding authority over the wholesale rates of energy in interstate commerce, but the Vandalia state law does not directly affect wholesale rates in interstate commerce. As a result, the Vandalia statute is not preempted by the expression of Congress or through occupation of the legislative field. Likewise, the Vandalia statute does not stand in obstacle to a federal goal as FERC expressly did not intend for Order 1000 to preempt state law. Thus, this court should find that the Vandalia state law survives ACES challenge under the Supremacy Clause.

IV. Vandalia's statutory ROFR does not overtly discriminate against out-of-state interests and does not place an excessive burden on interstate commerce, thus the statute does not violate the dormant Commerce Clause of the Constitution. The language of the statute does not facially discriminate against out-of-state participants as it makes no reference to the geographical location of the incumbent entities, merely defining an incumbent as an entity currently engaged in electric transmission within the state. Instead, the statute draws a neutral distinction between in-state and out-of-state participants. The current incumbents in Vandalia each have places of incorporation located outside of Vandalia, supporting that the statute does not have a discriminatory effect. The statute additionally does not require non-incumbents to have a relationship with incumbents in order to gain the right to build and operate a new line, providing further support for upholding the state law. The statute also does not place an undue

burden on interstate commerce in relation to its local benefit, allowing it to pass the *Pike* balancing test and remain in force.

The lower court granted the PSC's motion to dismiss on all issues. Vandalia PSC respectfully requests that this court affirm the lower court's judgment, thus preventing the appellant from circumventing traditional notions of standing and upholding state's traditional authority over siting and construction decisions, as intended by FERC.

ARGUMENT

Regarding the Capacity Factor Order, the court should find that ACES has not asserted sufficient facts to satisfy the Article III standing requirements as ACES has only asserted a hypothetical injury which cannot be redressed by the requested relief of invalidating the Capacity Factor Order. Even if the court finds that ACES has standing to challenge the Capacity Factor Order, the court should find that the Order is not preempted by the FPA under the Supremacy Clause of the Constitution.

Regarding the Statutory ROFR, the court should find that FERC Order 1000 does not preempt the Vandalia state law under the Supremacy Clause as states have the traditional authority over siting and construction of new transmission facilities. Lastly, the court should uphold the Vandalia statute in the face of ACES's dormant Commerce Clause challenge as it does not overtly discriminate against out-of-state interests and does not place an undue burden on interstate commerce.

I. ACES lacks standing to challenge the PSC's Capacity Factor Order as it has asserted a hypothetical injury with no direct link to the Order and would not benefit from this court invalidating the Order

To challenge the PSC's Capacity Factor Order, ACES must first satisfy the Article III standing requirements. The Constitution of the United States places a limit on Article III courts such that federal judiciary may only adjudicate cases and controversies. U.S. Const. Art. III, §2, cl. 1. To shield the judicial process from purely speculative challenges based on fact patterns that may never come to fruition, the plaintiff must have standing to satisfy the case or controversy requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Standing requires plaintiffs to satisfy three elements: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff bears the burden of proving each element of Article III standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 (2016) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

Here, ACES alleges that the Capacity Factor Order effectively sets wholesale rates in violation of the FPA, distorting price signals on the PJM Market and causing harm to their construction projects. [R. 1-2]. ACES's challenge fails for lack of standing as the injury is too speculative, the Order has not caused ACES any harm, and the requested relief will not address the speculated harm.

A. ACES has asserted a merely speculative injury in an attempt to circumvent traditional standing

At the threshold, the plaintiff must have suffered an injury-in-fact to satisfy the Article III standing requirement. *Lujan*, at 560-61. An injury-in-fact is an invasion of a legally protected interest which is concrete and particularized and actual or eminent, rather than conjectural or hypothetical. *Id*. The injury must affect the plaintiff in a personal and individual way. *Spokeo*, at

339. A statutory right to sue cannot create standing where traditional Constitutional standing would otherwise preclude. *Id*.; *see also Raines v. Byrd*, 521 U.S. 820 (1997). While Congress may elevate an intangible harm through a statute, this statutory right alone does not satisfy the injury requirement. *Id*. at 341; *contra Frank v. Gaos*, 586 U.S. ___ (2019) (dissent). Additionally, the plaintiff cannot assert a speculative injury that would happen at some future time, without a specified date. *Lujan*, at 564.

In *Spokeo*, the Court held that the statutory right created by Congress confers Article III standing only when coupled with a concrete harm. *Spokeo*, at 339-40. A statutory right satisfies the particularized requirement but falls short of being a concrete injury. *Id*. In *Allco*, a generating facility was disqualified from a bidding process, however if the bidding process complied with the FPA and PURPA the facility would have been accepted. *Allco Fin. Ltd. V. Klee*, 861 F.3d 82, 90 (2nd Cir. 2017). The court found that the plaintiffs had standing as they had both a statutory right and a concrete harm in satisfaction of the injury requirement. *Id*. at 95-96.

In this case, under the FPA, FERC regulates ACES, LastEergy, and Mapco as all three participate in interstate commerce through their respective contributions to the PMJ. [R. 3-4]. The FPA gives ACES a private right to receive just and reasonable rates. [R. 13]. While this satisfies the particularization aspect of injury, ACES fails to show a concrete harm. ACES has not proven that the Capacity Factor Order has caused actual economic harm, merely that it "could." [R. 2, 5].

Courts can only find standing where a plaintiff asserting a private right also asserts a concrete injury. *Spokeo*, at 334. Here, ACES has not shown a concrete injury and thus fails the first standing requirement.

B. ACES has not shown that any of its construction projects fall under the Capacity Factor Order and thus cannot purport to show that the Order has any causal link to its speculative harm.

Not only must a plaintiff allege an injury, but the injury must be fairly traceable to the challenged conduct. *Lujan*, at 560-61. ACES alleges they will receive detrimental harm to their construction projects due to the Capacity factor Order set forth by the Vandalia PSC. [R. 5, 7]. ACES attributes this speculative harm to the theoretical distortion of interstate wholesale rates due to the Capacity Factor Order. [R. 1-2].

In *Allco*, the court found a causation connection between the harm and the bidding process as the wrongful disqualification had already happened. *Allco*, at 95-96. Additionally, any other bidding process under the same program would result in the same discrimination and disqualification in the future. *Id*. at 96.

Under the Capacity Factor Order, LastEnergy and MapCo are "encouraged" to operate at 75 percent capacity and compensated for any loss if they meet this. [R. 1]. Neither LastEnergy nor MapCo have received subsidies or met the Capacity Factor Order since its inception. [R. 7-8]. ACES has not proven how their construction projects currently or imminently suffer harm by the theoretical rate distortion. [R. 5-6].

Without any evidence that ACES construction projects have or will actually suffer harm caused by the Capacity Factor Order, ACES fails the causation requirement of standing.

C. Without evidence that ACES has any construction projects subject to the Capacity Factor Order, invalidating the Order would not provide redress for their speculative harm.

The plaintiff must prove that the injury suffered will be redressed by a favorable decision to satisfy the redressability element. *Allco*, at 96 (citing *Friends of the Earth, Inc. v. Laidlaw*

Envt'l Servs.(TOC) Inc., 528 U.S. 167, 180-81 (2000). ACES requests that the court void the Capacity Factor Order under the Supremacy Clause. [R. 2, 14].

In *Allco*, the plaintiff suffered an injury following a wrongful disqualification from a bidding process in violation of the FPA and PURPA. *Allco,* at 91. The plaintiff requested that the court declare the auction preempted by the FPA, halting the program through an injunction, and barring the defendant from any future auctions that do not comply with the FPA and PURPA. *Id*. at 96. The plaintiff properly exhausted their remedies through administrative action, showing that the requested relief was favored over dismissing the claims. *Id*. at 94. The court found it substantially likely that the state would abide by the ruling in future auctions and that the plaintiff would provide an acceptable bid, ultimately ruling in the plaintiff's favor as the relief clearly would redress the harm. *Id*. at 96.

Here, ACES fails to show that the speculative harm by theoretical distorted rates will be redressed by the requested relief. Thus, ACES lacks the requisite Article III standing to challenge the Capacity Factor Order.

II. Even if ACES has standing, the FPA does not preempt the Capacity Factor Order as there is no "tether" to the wholesale market

The Supremacy Clause of the United States Constitution designates laws of the Unites States as the supreme law of the land, that federal law preempts contrary state law. U.S. Const., Art. VI, cl. 2; *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162 (2016). Preemption of a state law may arise in one of three circumstances, (1) where Congress expressly identifies its intent to do so, (2) where federal occupation of the legislative field implied preemption, or (3) where state and federal laws conflict. *See Id*. at 76-77; *see also Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015).

In 1935, Congress enacted the FPA which gives FERC authority to create effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. *N.Y. v. FERC*, 535 U.S. 1, 6 (2002). This includes regulating wholesale electricity rates in interstate commerce. *See* 16 U.S.C. §824(b)(1). Furthermore, FERC has the responsibility of determining whether a rate is "just and reasonable." *See Id*. at §824(e)(a). However, states have exclusive jurisdiction over generation facilities used for electric energy, including production and retail sales within their borders. *Id*. at §824(b)(1). FERC regulates wholesale electricity sales to ensure just and reasonable rates through competition. *Morgan Stanley Cap. Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008). FERC regulates these competitions to ensure an efficient market that produces a just and reasonable clearing price. *See FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 268 (2016).

A. Since the Vandalia Capacity Order sets no rate and both coal facilities are mandated to sell to the PJM market, it should not suffer the same as the program in Hughes

In *Hughes*, a Maryland program required local utilities to enter a "contract for difference" with a power plant compelled to participate into the interstate market which intruded into FERC's authority over interstate wholesale rates. *Hughes*, 578 U.S. at 159. The state determined a specified rate where if the capacity auction produced a shortfall, the local utilities paid the difference. *Id.* The Maryland program set subsidies conditioned upon the sale at a state specified rate into FERC regulated auctions. *Id.* at 153. The rate set by the Maryland PSC controlled the clearing price received by the participating in-state facilities. *Id.* By controlling the clearing price, the Maryland PSC was invading into the jurisdiction and burdening the goal of FERC. *Id.* at 163. The Court held that there was a "tether" between the program and the interstate wholesale auction, therefore preempted by the FPA. *Id.* at 166. The court further cautioned that the opinion

should not preclude states from encouraging new or clean production through "untethered" generators participating in the wholesale interstate market. *Id.*

Unlike Hughes, there is no "tether" to the wholesale market. *Id*. While LastEnergy and MapCo are mandated to sell into the PJM to comply with the Capacity Factor Order, the nature of their compliance with their FRR status with PJM was the foundation and not the result of the Capacity Factor Order. [R. 7]. Additionally, the Order does not set a rate to receive a subsidy like in *Hughes*. [R. 7]. The subsidy received would be the difference from the unburdened clearing price from interstate wholesale auctions and the coal facility's cost of production. [R. 7].

The court in *Hughes* held that the opinion set would not "foreclose a state from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." *Id*. The "tether" between the defendant in *Hughes* and the interstate market was the adjustment of interstate wholesale rates for the in-state generation facilities through the state specified rate coupled with the subsidies being conditioned on capacity clearing the market. *Id.* Here, there is no set rate, and the clearing price is wholly set by the interstate market controlled by FERC. Furthermore, the compulsion to receive the subsidies via the coal facility's sales into the interstate market is incidental to the fact that they are already mandated to sell exclusively into that market.

B. The ZEC line of cases following the **Hughes** *ruling prove that the market participation compulsion coupled with rate setting interferes with congressional purpose under the FPA*

In *ERSA*, the Second Circuit Court of Appeals held that Illinois PSC subsidy differentiated itself from the Maryland program in *Hughes* by not compelling interstate participation. *Electric Power Supply Assn. v. Star,* 904 F.3d at 523 (7th Cir. 2018). The Illinois PSC subsidized some nuclear generation facilities in order to prevent the facilities closure

through "Zero Emission Credits" ("ZECs"). *Id.* at 521. These credits were dependent on the average PJM auction price outcome per year. *Id.* at 522. The ZECs were compelled to be bought by the carbon emitting plants within Illinois, but the ZEC plants were not required to participate in the interstate wholesale auction. *Id.* at 521-22.

In *Zibelman*, the Seventh Circuit was brought with a similar case dealing with ZECs. *Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018). The State of New York subsidized qualifying nuclear plants whereby one was legally required to sell their output into the wholesale market. *Id.* at 52. The court distinguishes their case from *Hughes* by showing that: (1) the price is determined by an independent factor fixed every two years not "tethered" to wholesale prices; and (2) the New York PSC Order did not require the ZEC plants to participate into the wholesale market and therefore not "tethered" to interstate market participation. *Id.* at 51-54.

First, in the ZEC cases, the subsidies in both cases are not solely dependent on the auction prices but use the prices as a variable to compute their subsidies. In *Hughes*, the court explains that in PJM auctions, the PJM accepts bids until it has met its capacity demand and all sellers receive the highest accepted rate. *Hughes*, 578 U.S. at 150. This is the "clearing price." *Id.* The problem in *Hughes* was that the state-determined rate coupled with mandating interstate participation was the "doom" to the Maryland program. *Id.* at 166. In *ERSA* and *Zibelman*, both subsidies created a fixed subsidy using the "clearing price" from future or past dates. The Capacity Factor Order makes no fixed price but allows for the coal facilities to recover their losses to remain even. This does not affect rates, rather it allows the market to freely function and allow for coal facilities to recover losses to remain in business.

Second, while LastEnergy and Mapco are mandated to sell into the PJM to comply with the Capacity Factor Order, the nature of their compliance with their FRR status with PJM was the foundation and not the result of the Capacity Factor Order. It is by the nature of the coal facilities to sell into the interstate market and not by the Order alone. This is no different than the one ZEC facility in *Zibelman*, who must sell into the interstate auction since they're Exempt Wholesale Generators which are mandated to sell their capacity to the auction.

III. FERC Order 1000 does not preempt Vandalia's statutory ROFR under the Supremacy Clause as FERC does not have authority over siting decisions which the FPA reserves to the states

Whether FERC Order 1000 preempts Vandalia's statutory ROFR depends on whether the Order falls within the authority delegated to FERC by Congress. Federal preemption of a state law may arise in different circumstances, each presenting a different legal question; the first examines if Congress intended to preempt state law and whether state law conflicts with federal law, the second examines whether a federal agency has acted within the scope of its delegated authority. *N.Y. v. FERC*, at 17-18 (2002) (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). A federal agency only preempts state law when and if the agency acts within the scope of the authority delegated to it by Congress. *Id*. The purpose of Congress would guide the determination of the scope of the preemptive effect of a federal statute. *Hughes*, at 162 (citing *Altria Group., Inc. v. Good*, 555 U.S. 70, 76 (2008)). As described above, preemption of a state law may occur in three circumstances, (1) express preemption by Congress, (2), field preemption by legislative occupation, or (3) conflict preemption. *See Hughes*, at 76-77; *see also Oneok*, at 376-77.

A. The scope of authority delegated to FERC by Congress under the FPA does not extend to siting or construction decisions for transmission facilities, supported by the legislative history

With the FPA, Congress divided responsibility over energy regulation between states and the federal government (FERC). *Coal. For Competitive Elec.*, at 49. Congress delegated to FERC exclusive regulatory authority over wholesale sales of electric energy in interstate commerce. 16 U.S.C. §824(a). This authority extends over rules and practices which may affect wholesale rates, this authority extends only to those which directly affect the whole sale rate. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 277 (2016). The FPA places authority over certain decisions relating to energy beyond FERC and to the states such as energy production and generation facilities. *Id*.; 16 U.S.C. §824(b), (b)(1). States have characteristically had authority over the need for new transmission facilities, their economic feasibility and services. *Pac. Gas & Electric Co. v. State Energy Res, Conservation and Dev. Comm'n*, 461 U.S. 190, 205 (1983).

In *Hughes*, the Court considered whether a state program violated the Supremacy Clause. *Hughes*, at 153. The state program effectively set the wholesale rate in interstate commerce, contravening the division of authority between FERC and the states by the FPA. *Id*. at 163. Congress, via the FPA, gave the exclusive authority over interstate wholesale rates to FERC, leaving no room for the states to regulate. *Id*. This supported that the state program was preempted both expressly by Congress in the FPA and through occupation of the legislative field by Congress and FERC. *Id*.

Distinguishing facts in this case support finding that Order 1000 does not preempt the Vandalia statutory ROFR. The state law does not regulate the wholesale rate in interstate commerce; it does not attempt to regulate rates or prices at all. The Vandalia's law serves only as

a response to the disruption caused by Order 1000 and has a goal of maintaining the status quo by giving incumbents a state ROFR where, pre-Order 1000, they would have had a federal ROFR. [R. 9]

ACES asserts that Vandalia's state ROFR law target competitive solicitation, nullifying FERC-set rates. [R. 15]. The record does not support this conclusion. States may regulate within the domain of Congress assigned to them even when they incidentally affect FERC's domain, provided that the state does not aim to intrude on FERC's longstanding and exclusive authority over interstate wholesale rates. *See Hughes*, at 164.

B. The Commission expressly stated that it did not intend to preempt state laws or regulations with respect to siting and construction of transmission facilities

Conflict preemption exists when compliance with both a state and federal law becomes impossible or when a state law creates an obstacle to the purpose of a federal law contemplated by Congress. *Arizona v. United States*, 567 U.S. 387, 401 (2012). In either circumstance, the federal law would prevail, in accordance with the Constitution *Id*. Here, compliance with both the state and federal law is not at issue, it is possible for parties to comply with both rules. The only potential consideration is whether Vandalia's law stands in obstacle to the purpose of Order 1000.

Neither the FPA or FERC Order 1000 expressly preempt state regulations relating to siting or construction of transmission facilities, thus Vandalia's statutory ROFR is valid under the Supremacy Clause. *See Oneok*, at 376. FERC noted in Order 1000 that nothing in the Final Rule intends to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limits to, authority over siting or permitting of transmission facilities. 163 FERC 61,051 at 107. In *South Carolina Pub. Servs.*

Auth., the Seventh Circuit found that with Order 1000, FERC wanted to avoid intrusion on the tradition role of the states in regulating siting and construction of new transmission facilities and that non-incumbents must comply with state laws. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (7th Cir. 2014).

Vandalia's statutory ROFR does not create an obstacle to Order 1000 and FERC did not intend its own Order to preempt state laws such as Vandalia's. This supports finding that Order 1000 does not preempt the Vandalia statute under the Supremacy Clause of the Constitution.

IV. Vandalia's statutory ROFR does not overtly discriminate against out-of-state participants and does not place an excessive burden on interstate commerce, thus the statute does not violate the dormant Commerce Clause

The Commerce Clause in the United States Constitution expressly grants Congress the power to regulate commerce among the States. U.S. Const. Art. I, §8, cl. 3. The dormant Commerce Clause infers a negative to this grant, prohibiting the states from promulgating regulations which discriminate between in-state and out-of-state participants in a manner which burdens interstate commerce. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). State regulations may violate the dormant Commerce Clause by directly discriminating against out of state interests with a protectionist intent. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Absent express discrimination state regulations may violate the dormant commerce clause if the burden placed on interstate commerce outweighs the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A. *The language of Vandalia's statutory ROFR does not facially discriminate against out-or-state participants in favor of in-state participants, and thus does not overtly discriminate in violation of the dormant Commerce Clause*

State laws which mandate differential treatment of in-state and out-of-state actors face the virtually *per se* legal standard in violation of the dormant Commerce Clause. *Granholm*, at 472 (citing *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of Ore.*, 511 U.S. 93, 99, 128 (1994)). States cannot facially discriminate against out-of-state participants for the simple purpose of giving in-state participants a competitive advantage. *Hughes*, at 325-26. Courts examine the language of a statute to determine whether it facially discriminates against out-of-state participants, only those drawing a neutral distinction survive. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1027 (8th Cir. 2020).

The Fifth and Eighth Circuit Courts have reviewed state statutory ROFR's like the Vandalia statute at issue, and the two courts have split on the issue of over discrimination. *LSP Transmission Holdings, LLC*, at 1026; *compare NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022). This court should follow the Eighth Circuit determination that place of incorporation controls as a state statute cannot facially discriminate against out-of-state interests if the statute provides benefits to out-of-state participants.

1. *Vandalia's statutory ROFR grants benefits to transmission owners incorporated outside of Vandalia, thus the statute cannot be interpreted to overtly discriminate against out-of-state interests*

In *LSP Transmission Holdings*, the Eighth Circuit found that a Minnesota statutory ROFR did not facially discriminate against out-of-state participants. *Id*. The Minnesota statute gives incumbent electric transmission owners the right to construct, own, and maintain approved electric transmission lines connecting to facilities owned by that incumbent. *Id*.; MINN. STAT.

§216B.246, subdiv. 2 (2022). Minnesota defines an incumbent electric transmission owner as any public utility that owns, operates, and maintains a transmission line in this state; any generation and transmission cooperative, municipal power agency, power district, municipal utility, or transmission company. *Id.* at subdiv. 1(c). The court found that the language of the Minnesota statute did not make any distinction between transmission owners based in- or out-of-state, finding no facial discrimination. *LSP Transmission Holdings*, at 1029.

The Vandalia's stature has very similar language to the Minnesota statute, supporting that this court follow the Eighth Circuit in this case. MINN. STAT. §216.246 (2022). [R. 9, 10]. Vandalia's statute defines an incumbent as any public utility that owns, operates, and maintains a transmission line in Vandalia and any municipal power agency, power district, municipal utility, or other entity engaged in the business of electric transmission in Vandalia. [R. 10]. This definition gives makes no distinction between an in-state and out-of-state participant, but merely defines an incumbent as an entity currently engaged in transmission on Vandalia. [R. 10]. Further, the Native Transmission Protection Act gives a state ROFR right to an incumbent electric transmission owner, without making any reference as to whether the owner is considered in-state or out-of-state. [R. 9].

The language similarity between Vandalia's statutes and the Minnesota statutes described in *LSP Transmission Holdings* warrant that this court follow that rule. Alternatively, the fact that the language of the statute draws only a neutral distinction between incumbents and non-incumbents supports that this court can uphold the state law.

2. The lower court correctly rejected the Fifth Circuit approach as the Texas statute goes farther in its discrimination, warranting a different outcome

ACES asserts that this court should follow the Fifth Circuit decision which rejects the idea that incorporation controls. [R. 15]. However, courts engage in statutory interpretation when determining whether a state law is overtly discriminatory. *See Phila. v. N.J.*, at 616. Language differences between Vandalia's statute and the Texas statute still support finding that Vandalia's statute makes only a neutral distinction.

In *NextEra*, the Fifth Circuit held that a Texas state statutory ROFR overtly discriminated against out-of-state participants in violation of the dormant Commerce Clause. *NextEra*, at 323. Like the statute in *LSP Transmission Holdings*, the Texas statute does not make a geographical distinction between incumbents and non-incumbents. TEX. UTIL. CODE §37.056(e) (2021). Unlike the Minnesota statute, however, the Texas law places an addition restriction on non-incumbents that they may only get the right to build or operate a new transmission facility if an incumbent gives them the right. *Id.* at §37.056(g). This places an additional requirement that a company have a sort of boots on the ground relationship with a Texas incumbent already, something difficult to achieve as the ERCOT grid operates wholly intrastate in Texas. *NextEra*, at 325.

The 18-month period imposed by the Vandalia statute does not amount to the same discriminatory effect as with the Texas statute, as ACES has asserted. [R. 15]. Vandalia's statute, unlike the Texas law, does not require a non-incumbent entity to have an existing or build a new relationship with an incumbent in order to gain the right to construct and operate a new transmission line. [R. 9, 10]. If ACES does not want to wait out the full 18 months for MapCo or LastEnergy to decide whether they will exercise their ROFR, ACES has an alternative remedy it

can seek that it has not taken advantage of or exhausted. [R. 9, 15]. ACES may petition FERC to review the ROFR if it were selected in a competitive solicitation under 16 U.S.C. §824.

In this case ACES asserts that Vandalia's law is just like the Texas law. [R. 15]. The language of the Texas statute proves patently different than that of the Vandalia statute. Vandalia's statute does not require that non-incumbents obtain the right to construct or operate new transmission facilities from an incumbent. [R. 9, 10]. This difference in language between the laws support that this court should decline to follow the Fifth Circuit.

B. Vandalia's statute does not place an excessive burden on interstate commerce such that would require the court to invalidate the law.

The second tier of analysis under the dormant Commerce Clause asks the court to weigh the burden placed on interstate commerce against the putative local benefit using the *Pike* test. *Pike*, 397 U.S. 142. The test requires courts to balance a legitimate local public interest against its incidental burden on interstate commerce. *Id*.

1. Vandalia has a legitimate local interest in granting incumbents a right of first refusal

The regulation of utilities is a function traditionally associated with the state police power. *Ark. Electric Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). And, unlike natural gas regulation where FERC has regulatory authority over bot pricing and siting of interstate pipelines, states retain regulatory authority over the location and construction of electrical transmission lines. *III. Commerce Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013). These principles support that states have a legitimate local interest in protecting their incumbents.

In *LSP Transmission Holdings*, the court found that Minnesota had a legitimate interest in part based on the legislative history of the state statutory ROFR. *LSP Transmission Holdings*, at 1031. Minnesota enacted its ROFR following the issuance of FERC Order 1000 to address uncertainty the Order created. *Id*. The court found this goal fell within the purview of a state's legitimate interest in regulating intrastate transmission of energy. *See* 16 U.S.C. §824(b)(1).

Similarly, the Vandalia legislature indicated that it intended the Native Transmission Protection Act to maintain the status quo after Order 1000 removed the federal ROFR. [R. 9]. The similarity in language between the Minnesota statute and the Vandalia statute, combined with the similar purpose and legislative history, support finding that Vandalia has a legitimate local interest under the *Pike* test.

2. ACES has not established that Vandalia's statutory ROFR places an undue burden on interstate commerce

A state law which places an undue burden on interstate commerce when balances against its local benefit violates the dormant Commerce Clause. *See LSP Transmission Holdings*, at 1031. Additionally, courts rarely rely on the *Pike* test in determining whether to invalidate a state law under the Commerce Clause. *See S. Union Co. v. Mo. PSC*, 289 F.3d 503, 509 (8th Cir. 2002).

In *LSP Transmission Holdings*, the court found that although Minnesota's statutory ROFR *could* have an effect on a non-incumbent's ability to build approved transmission lines. *Id*. (emphasis added). The court ultimately found that the case did not present enough evidence of a cumulative effect showing that the ROFR would altogether eliminate market competition, finding that the state law passed the balancing test. *Id*.

Similarly, here ACES has not established that Vandalia's ROFR would have the effect of eliminating market competition. [R. 15, 16]. The 18-month time period placed on the incumbent's ROFR does not eliminate competition, but simply places a deadline on exercise of the right by incumbents. [R. 9]. Additionally, ACES purports that the time period would hinder competition by making it difficult to secure financing, but ACES has not asserted that it has in fact had a difficult time finding funding. [R. 15].

ACES fails to establish a cumulative effect eliminating market competition, supporting that this court can find that the Vandalia statute passed the *Pike* balancing test.

CONCLUSION

For the reasons set forth above, the Vandalia Public Service Commission respectfully requests that this court affirm the Order of the U.S. District Court for the Northern District of Vandalia by upholding the PSC's Motions to Dismiss.

APPENDIX A: CERTIFICATE OF SERVICE

Pursuant to the *Official Rule IV, Team Members* representing the 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. 30