**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, | ) |
| COMMISSIONER EVELYN ELKINS, | ) |
| in her official capacity | ) |
| | ) |
| *Appellee.* | ) |

APPEAL FROM AN ORDER GRANTING THE MOTION TO DISMISS IN A CIVIL CASE IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF VANDALIA

C.A. No. 22-0682

**BRIEF FOR APPELLANT APPALACHIAN CLEAN ENERGY SOLUTIONS**

Team 17

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## STATEMENT OF JURISDICTION

Plaintiffs-Appellants, Appalachian Clean Energy Solutions, Inc. ("ACES") filed this action in the United States District Court for the Northern District of Vandalia to challenge the constitutionality of Vandalia's Right of First Refusal ("ROFR") and Capacity Factor Order ("CFO") and under the Native Transmission Protection Act of 2014. Plaintiff brought claims under the United States Constitution, asserting that (1) the ROFR violates the dormant commerce clause (U.S. CONST. ART. I § 8) and (2) the CFO and ROFR violate the Constitution's Supremacy Clause (U.S. CONST. ART. VI CL. II). The District Court had subject matter jurisdiction under 28 U.S.C. § 1331.

On August 15, 2022, the District Court granted Defendants' motion to dismiss and final judgment was entered thereafter. Plaintiffs timely appealed on August 29, 2022. Fed. R. App. P. 4(a)(1). This Court has jurisdiction because this is an appeal from a final judgment of the United States District Court, 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED

The issues on appeal are:

1. Whether a state law that expressly prefers entities with an existing in-state presence to build transmission facilities serving the interstate electricity market and essentially prohibits all out-of-state energy companies from entering Vandalia's interstate transmission market violates the dormant commerce clause by discriminating against interstate commerce?
2. Whether ACES has standing to challenge the CFO as an injured party due to their participation in the PJM market?

3. Whether the Federal Power Act, which grants FERC exclusive authority to regulate interstate wholesale markets, preempts the CFO issued by Vandalia PSC?
4. Whether FERC's Order 1000, which eliminates ROFRs for regional and interstate transmission facilities, prohibits and preempts Vandalia's PSC from enacting an ROFR for regional and interstate transmission infrastructure?

## STATEMENT OF THE CASE

Plaintiff-Appellant Appalachian Clean Energy Solutions, Inc. ("ACES") is the largest independent electricity transmission company in the United States. J.A. 5. They construct and maintain electric transmission lines through the eastern region and exclusively sell electricity into wholesale markets. J.A. 5. In April 2020, ACES planned to construct a natural gas-fired generating plant in southwestern Pennsylvania with an accompanying transmission line known as the Mountaineer Express. J.A.5-6. The Mountaineer Express would span 460 miles from Rogersville, Pennsylvania to Raleigh, North Carolina, with intermediate substations to transmit electric energy resources throughout the entire length of the line, a significant portion of the mid-Atlantic. J.A. 5-6. One of the proposed substations is in Vandalia. *Id.*

Vandalia has historically been one of the largest producers of coal-fired power in the nation, but the coal industry is in economic decline. J.A. 4. There are two utility companies that currently provide energy to Vandalia: LastEnergy and Mid-Atlantic Power Company ("MAPCo"). J.A. 4. These two utilities each operate coal-fired power plants within Vandalia, but these plants are becoming less cost-effective due to the availability of cheaper energy sources. J.A. 7.

The Vandalia Public Service Commission ("PSC") regulates in-state electricity generation, as well as retail electricity sales. J.A. 6. The Federal Energy Regulatory Commission

("FERC") regulates that which is not left to the states: interstate electricity transmission and interstate wholesale sales. *See* 16 U.S.C. § 824(b)(1). Utilities can participate in the wholesale market through bilateral contracts to sell their electricity or through competitive wholesale auctions. J.A. 4.

PJM Interconnection, a regional transmission organization ("RTO") created under FERC's authority, regulates the mid-Atlantic grid and operates energy and capacity auctions. J.A. 3. Energy auctions are based on present energy demand while capacity auctions concern future energy demand and ability. *Id.* In both auctions, utilities bid their available energy, or capacity, into the market. *Id.* PJM then accepts bids in ascending order until demand is satisfied. *Id.* The highest price accepted by PJM becomes the "market clearing price" and all successful bidders have "cleared" the market and receive the clearing price, regardless of the price of their bid. *Id.*

PJM is also responsible for approving construction of new transmission facilities within its region. In March 2022, ACES' Mountaineer Express was approved by PJM for inclusion in the Regional Transmission Expansion Plan ("RTEP"). J.A. 3; 6.

## I. RIGHT OF FIRST REFUSAL (ROFR)

Prior to Order 1000, most ISOs, including PJM, had ROFRs that gave incumbent transmission owners the exclusive right to construct new transmission lines. J.A.13. In 2011, FERC issued Order 1000, which required ISOs to eliminate ROFR provisions for regional transmission facilities from their FERC-approved tariffs. J.A.9. Specifically, Order 1000 "direct[s] public utility transmission providers to remove from . . . Commission jurisdictional tariffs . . . any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." Order 1000 at 3 ¶

7.2. In order to implement FERC Order 1000, PJM implemented a competitive planning process for new transmission facilities. J.A.6.

In response to FERC Order 1000, in 2014, Vandalia passed the "Native Transmission Protection Act," which gave the exclusive right, for eighteen months, to construct electric transmission lines in the State to the existing incumbents that currently owned the endpoints from which new transmission lines would be built. J.A.9. These incumbents, by definition, had to have a prior in-state presence in Vandalia.[1] As a result, the only qualifying incumbent facilities were LastEnergy and MAPCo. J.A.4. These entities are the only retail utilities in Vandalia and serve large interstate customer bases throughout the Mid-Atlantic and Midwest. J.A.4.

After PJM's approval in March 2022, ACES' Mountaineer Express was included in the Regional Transmission Expansion Plan ("RTEP"). J.A. 3; 6. However, because of Vandalia's ROFR, ACES is unable to build its proposed transmission infrastructure. J.A.2.

## II. THE CAPACITY FACTOR ORDER (CFO)

Because of Vandalia's legacy in the coal industry, the State Legislature issued a directive to the PSC, that states, in relevant part, "[i]t is imperative the State of Vandalia take immediate

[1] Specifically, Vand. Code § 24-12.3(d) 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. . .if such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

The statute defines "incumbent electric transmission owner" in pertinent part as: [A]ny public utility that owns, operates, and maintains an electric transmission line in this state." Vand. Code § 24-12.2(f).

steps to reverse these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close." Vand. Code § 24-1-1(a)(2); J.A. 6.

In May of 2022, in furtherance of these goals, the PSC issued the Capacity Factor Order (CFO). J.A. 7. The CFO requires both LastEnergy and MAPCo to operate their coal-fired power plants at, or above, seventy-five percent capacity. *Id.* This followed submission of annual filings by both LastEnergy and MAPCo that indicated that their coal-fired plants operated at or below approximately sixty percent capacity (meaning the plants were running at maximum power less than sixty percent of the time). *Id.*

Due to concerns of economic loss if the coal-fired power plants operated at increased capacity, the CFO includes a cost recovery mechanism for LastEnergy and MAPCo. J.A. 8. When the cost of operating at seventy-five percent capacity is greater than the clearing price in the PJM market, only LastEnergy and MAPCo can recover the economic deficit through increasing their retail rates. *Id.* The CFO disfavors ACES and distorts the PJM market through wholesale rate setting and power allocation. *Id.*

## III. PROCEEDINGS BELOW

ACES filed suit against the PSC on June 6, 2022, challenging both the ROFR and the CFO. J.A.14-15. ACES argued the ROFR discriminated against interstate commerce in violation of the Dormant Commerce Clause. J.A.15. ACES further argued that the CFO was preempted by the FPA, and that the ROFR was preempted by both the FPA and Order 1000 under the Supremacy Clause. J.A.14-15. On June 27, 2022, the PSC moved to dismiss all claims. J.A.14.

The district court reasoned the ROFR did not facially or practically discriminate against interstate commerce, and under the *Pike* balancing test, the benefits to Vandalia outweighed the burdens. J.A.16. The district court concluded that the ROFR did not violate the dormant commerce clause and was not preempted under the Supremacy Clause. J.A.16. As for the CFO, the district court again granted the motion to dismiss, finding ACES lacked standing, and that the CFO was not preempted. J.A.15. ACES timely appealed on August 29, 2022. J.A.16.

## SUMMARY OF THE ARGUMENT

The district court erroneously granted the motion to dismiss for the Right of First Refusal ("ROFR") and Capacity Factor Order ("CFO") for the following reasons.

### I. DORMANT COMMERCE CLAUSE

The District Court erred in granting the motion to dismiss because Vandalia's ROFR violates the dormant commerce clause and is preempted by Order 1000. The ROFR violates the dormant commerce clause because it *facially* discriminates against interstate commerce by both prohibiting out-of-state energy entities from building transmission infrastructure and imposing an unconstitutional mandate that requires an energy entity have a prior in-state presence to build transmission infrastructure. Further, the ROFR perpetuates *discriminatory effects* on interstate commerce through the ROFR's incumbent requirement, which effectively prevents all out-of-state energy companies from entering the interstate transmission market in Vandalia. Moreover, Vandalia's ROFR was intended by the Vandalia legislature to perpetuate simple economic protectionism, which is an unconstitutional, discriminatory purpose under the dormant commerce clause that renders the law invalid. Finally, the burdens of Vandalia's ROFR on interstate commerce far outweigh the benefits, and thus the lower court failed to properly evaluate the extent of the burdens imposed by Vandalia's ROFR and erroneously granted the motion to dismiss.

### II. STANDING

The district court erred in dismissing ACES' claims regarding the CFO because ACES has standing to challenge the CFO. This is because ACES suffers a concrete economic injury as a result of the CFO's application exclusively to LastEnergy and MAPCo. As participants in the PJM market, ACES will be economically injured because the CFO will result in LastEnergy and MAPCo operating as "price takers" and driving down the clearing price. Second, by distorting the market and mandating LastEnergy and MAPCo contribute a higher percentage of capacity, ACES is prevented from participating in free market competition as intended by FERC. The court can redress this injury by holding the CFO unconstitutional.

## III. PREEMPTION

Finally, both the CFO and ROFR are preempted. The district court errored in granting the motion to dismiss because the CFO is an abuse of state authority and is field preempted by the FPA. First, by allowing cost recovery based on the wholesale clearing price, the CFO regulates wholesale rates—an area expressly reserved by Congress for FERC. Second, the CFO infringes on FERC's policy objective of encouraging a competitive and efficient wholesale marketplace. Finally, the CFO has a direct tether to wholesale market and FERC's jurisdiction because it compels participation in the wholesale market.

The District Court also faulted in granting the motion to dismiss because Vandalia's ROFR is preempted. First, Vandalia's ROFR is conflict-preempted because it is incompatible with the goals and intentions of Order 1000, Congress, and FERC. Second, Vandalia's ROFR is preempted because FERC acted within the scope of its congressionally delegated authority in issuing Order 1000. Therefore, this court should reverse the lower court's erroneous grant of the motion to dismiss.

# ARGUMENT

**STANDARD OF REVIEW:** This Court reviews a district court's ruling on a motion to dismiss de novo. *Muto v. CBS Corp.*, 668 F.3d 53, 56 (2nd Cir. 2012).

## I. VANDALIA'S STATUTORY ROFR DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF THE DORMANT COMMERCE CLAUSE.

The ROFR issued by Vandalia as part of the Native Transmission Protection Act of 2014 violates the dormant Commerce Clause ("DCC"). In hearings related to Order 1000, then-FERC Commissioner Norman Bay warned that Order 1000 "does not determine the constitutionality of any particular state right-of-first-refusal law . . . [s]tate laws that discriminate against interstate commerce – that protect or favor in-state enterprise at the expense of out-of-state competition – may run afoul of the dormant commerce clause."[2] Vandalia's ROFR is precisely the type of state law that discriminates against interstate commerce and is unconstitutional.

Article I of the U.S. Constitution provides that Congress has the power to "regulate Commerce . . . among the several states." U.S. CONST. ART. I § 8 CL. 2. One element of the commerce power is the dormant Commerce Clause which "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). When a state law such as Vand. Code § 24-12.3(d) demonstrates "simple economic protectionism . . . a virtually *per se* rule of invalidity" applies. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To justify a state law that discriminates against interstate commerce "either on its face or in practical effect," the State must meet a rigorous bar and demonstrate that the statute "serves a legitimate local purpose," that could not be served by any available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986)

[2] COMMISSIONER NORMAN C. BAY, STATEMENT ON MISO ORDER 1000 REHEARING (Jan. 22, 2015) https://www.ferc.gov/news-events/news/commissioner-norman-c-bay-statement-miso-order-no-1000-rehearing.

(quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Vandalia's ROFR is unable to meet this high bar.

### A. Vandalia's ROFR is facially discriminatory against interstate commerce in violation of the DCC.

Vandalia's ROFR facially discriminates against out-of-state energy companies in violation of the DCC. This is because the ROFR requires an electric transmission constructor be incumbent and have a prior presence in Vandalia, or in the state's words, the public utility must "own, operate, and maintain an electric transmission line" in Vandalia in order to "construct, own, and maintain" a new electric transmission line. Vand. Code §§ 24-12.3(d), 24-12.2(f). This language blatantly favors in-state energy companies in violation of the DCC, unconstitutionally imposes a prior in-state presence requirement to construct new transmission lines, and restricts interstate commerce by preventing out-of-state entities from entering the market. *See Nextera Energy Capital Holdings v. Lake*, 48 F. 4th 306, 326-28 (5th Cir. 2022) (holding ROFR that restricts out-of-state energy companies from building transmission infrastructure unconstitutional on DCC grounds).

First, Vandalia's ROFR facially discriminates against out-of-state entities in violation of the DCC. *See Dean Milk Co. v. City of Madison*, 340 U.S 349, 354 (1951) (invalidating a state law that made it illegal to sell milk unless pasteurized within five miles of Madison on DCC grounds); *Philadelphia*, 437 U.S. at 629 (invalidating a state law that prohibited importation of out-of-state waste on DCC grounds). Vandalia's treatment of out-of-state energy companies is exactly the discriminatory treatment the Supreme Court sought to prevent when it invalidated the laws at issue in *Dean Milk* and *Philadelphia*, as Vandalia's ROFR discriminates against out-of-state entities, preventing them from entering the interstate market of electricity transmission unless eighteen months have passed. J.A.2.

Next, Vandalia's ROFR facially discriminates by imposing an in-state presence requirement and granting an ROFR to incumbent utilities. This is an unconstitutional violation of the DCC. *See Tenn. Wine*, 139 S. Ct. at 2476 (invalidating state law that requires in-state presence and residency for two years to obtain a liquor license on DCC grounds); *Granholm v. Held*, 544 U.S. 460, 474-75 (2005) (invalidating state law that requires in-state presence to ship wine directly to consumers on DCC grounds). Vandalia's ROFR thus violates the DCC by mandating an in-state presence to construct a transmission line.

In *Nextera Energy*, the Fifth Circuit held that a Texas ROFR with an in-state presence requirement, which provided that only companies with a preexisting in-state presence could build new transmission lines, facially discriminated in violation of the DCC. 48 F. 4th at 325-326. The Court explained that "requiring boots on the ground discriminates against interstate commerce." *Id*. The local presence requirement at issue in *Nextera Energy* is identical to the local presence required by Vandalia's ROFR. *Compare* Vand. Code §§ 24-12.3(d),12.2(f) ("[A]ny public utility that owns, operates, and maintains an electric transmission line in this state" "has the right to construct, own, and maintain an electric transmission line) *with* Tex. Util. Code § 37.056(e) (ability to build, own, or operate new lines 'that directly [connect] with an existing utility facility may be granted only to the owner of that existing facility''). Hence, similar to *Nextera Energy*, Vandalia's in-state presence requirement is an unconstitutional violation of the DCC.

**B. Vandalia's ROFR imposes discriminatory effects on interstate commerce in violation of the dormant commerce clause.**

Vandalia's law further violates the DCC by imposing discriminatory *effects* on interstate commerce. By preventing out-of-state energy companies such as ACES from entering the market, Vandalia's ROFR is *practically* discriminatory and unconstitutional. Facially neutral statutes that have the *practical effect* of discriminating against interstate commerce violate the DCC. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977) (invalidating a facially neutral law that has the practical effect of discriminating against out-of-state producers on DCC grounds); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (same). Therefore, even if this Court finds the law is not facially discriminatory, the law imposes significant disparate impacts on interstate commerce and discriminates due to its *practical effects*. This is because transmission infrastructure located in Vandalia is one portion of an interconnected interstate electricity grid that delivers electricity all over the mid-Atlantic United States. J.A.4. Vandalia's ROFR restricts constructing, owning, and operating transmission lines through which electricity travels in interstate commerce. Vand. Code § 24-12.3(d). In doing so, Vandalia impermissibly stymies interstate commerce by allowing only in-state Vandalian businesses to construct and operate transmission lines while prohibiting out-of-state entities from doing so. And, Vandalia's ROFR has the effect of completely excluding out-of-state energy companies like ACES from the interstate electricity transmission market. *See* J.A.4 ("Vandalia is served by two retail utilities . . . [both] ha[ve] . . . operating coal-fired power plants in Vandalia."). Similar to *Hunt* and *Carbone*, these sorts of discriminatory effects do not pass scrutiny under the DCC and are unconstitutional.

While the PSC argues that the eighteen-month waiting period does not totally exclude out-of-state companies, this waiting period is inordinately long and so has the practical effect of excluding all out-of-state entities from constructing transmission infrastructure in Vandalia. J.A.4. Further, not only does an out-of-state company have to wait eighteen months, but also, LastEnergy and MAPCo would need to decline to exercise their ROFR, which is unlikely given that representatives from both companies think that the ROFR "was necessary to keep the transmission lines in the hands of . . . more responsive in-state companies." J.A.9.

Moreover, the district court ignored the discriminatory impacts of Vandalia's ROFR and granted the PSC's motion to dismiss in part because "there is no discrimination against out-of-state entities," pointing to ACES, LastEnergy, and MAPCo's place of incorporation. J.A.16. This stemmed from the PSC's assertion of *LSP Transmission Holdings, LLC v. Sieben*, which found that place of incorporation was relevant to the DCC inquiry. 954 F.3d 1018, 1027–29 (8th Cir. 2020). However, place of incorporation has no place in DCC analysis. *See Nextera Energy*, 48 F. 4th at 322-23 (noting that prior DCC precedent has never mentioned place of incorporation in determining whether a company qualifies as in-state or out-of-state and explaining that local presence rather than place of incorporation is what matters); *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005) (invalidating state law on DCC grounds and noting place of incorporation is not relevant to DCC inquiry, because treating entities with an in-state presence as out-of-state solely due to their place of incorporation or corporate headquarters is erroneous); *Florida Transportation Serv's v. Miami-Dade Cty.*, 703 F.3d 1230, 1259 (11th Cir. 2012) (invalidating state law on DCC grounds and noting that "dormant Commerce Clause liability [should not] turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place"). Because DCC analysis turns on in-state presence rather than an entity's place of incorporation, Vandalia's ROFR discriminates against interstate commerce in violation of the DCC.

### C. The purpose of Vandalia's ROFR is not legitimate, and instead intends to discriminate against out-of-state transmission companies.

Vandalia's ROFR intended to discriminate against out-of-state energy companies and is thus per se invalid. According to the U.S. Supreme Court, in the context of the DCC, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority,* 550 U.S. 330, 338 (2007) (quoting *Oregon Waste Systems v. Dept. of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). In ascertaining the purpose of Vandalia's ROFR, this Court need look no further than the legislative record. *See Minnesota v. Clover Leaf Creamery Co,* 449 U.S. 456, 465 (1981) (turning to the legislative record to evaluate discriminatory purpose for DCC analysis).

Here, the senator who introduced Vandalia's ROFR noted it is a "'direct response' to Order 1000 and its elimination of federal ROFRs. J.A.9. Furthermore, testimony from the only two energy companies currently operating in Vandalia (and subsequently the only two companies who are incumbents that qualify for Vandalia's ROFR) explained that the ROFR served several discriminatory purposes: it "was necessary to keep the transmission lines in the hands of purportedly more responsive in-state companies"; it "restore[d] the 'status quo' from before Order 1000"; and finally, it gave "Vandalia utilities . . . the first opportunity to invest in federally regionally planned transmission projects." J.A.9. This reveals the requisite discriminatory intent and economic protectionism that is per se invalid under the DCC. *See Philadelphia*, 437 U.S. at 624 (invalidating state law under DCC because "the State. . .overtly moved to slow or freeze the flow of commerce for protectionist reasons"); *C & A Carbone*, 511 U.S. at 390 (invalidating state law under DCC because it was protectionist and discriminatory); *Nextera Energy*, 48 F. 4th at 326 (holding ROFR invalid under DCC because "limiting competition based on the existence or extent of a business's local foothold is the protectionism that the Commerce Clause guards against"). Therefore, Vandalia's ROFR is an unconstitutional violation of the DCC.

**D. The burdens of Vandalia's ROFR on interstate commerce outweigh the benefits.**

While there is generally a rule of per se invalidation for blatant discrimination such as Vandalia's ROFR, the Court may choose to weigh the burdens on interstate commerce and the local benefits of the law, and if the ‘‘burden imposed on such commerce is clearly excessive in relation to the putative local benefits,’’ the law is invalid. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). In *Clover Leaf Creamery*, the Court explained that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 449 U.S. at 471.

Vandalia's ROFR imposes significant burdens on interstate commerce in violation of the U.S. Constitution, and the lower court failed to fully examine these burdens. First, Vandalia's ROFR imposes even more significant burdens on interstate commerce than the laws held invalid in *Dean Milk*, *Tenn Wine*, or *Granholm*. *See Dean Milk*, 340 U.S at 354 (state law made it illegal to sell milk unless pasteurized within five miles of Madison); *Tenn. Wine*, 139 S. Ct. at 2476 (state law required residency for two years to obtain a liquor license); *Granholm*, 544 U.S. at 474-75 (state law required in-state presence to ship wine directly to consumers).

Further, Vandalia's ROFR is unconstitutional because, like the Texas ROFR at issue in *Nextera Energy*, it imposes "a local-presence requirement frozen in place." 48 F. 4th at 325. As the Court in *Nextera Energy* explained, if a company "had not built transmission lines in Texas before *2019*, it can never build such lines." *Id* (emphasis added). Vandalia's ROFR is even more egregious because it has "a local presence requirement frozen in place" starting in *2014*, nearly five years earlier than Texas.

Relatedly, the district court erroneously reasoned that "the burden on interstate commerce is far less than that in Texas . . . [because] unlike the Texas law. . . ACES [can] build the transmission line in eighteen months if the incumbent utilities decline to exercise their ROFR." J.A.16. However, the eighteen-month loophole does not save Vandalia's ROFR, because eighteen months is a significant waiting period that has had the practical effect of excluding all out of state entities. J.A.4.

Further, this eighteen month provision makes Vandalia's ROFR more egregious than the ROFR that was upheld under the DCC in *Sieben*. There, the ROFR allowed any entity, even those without a Minnesota transmission facility, to enter the market if the incumbent did not exercise its rights to compete within ninety days. 954 F.3d at 1030-31. The Eighth Circuit upheld this ROFR, explaining it did not violate the DCC. *Id.* That case is unlike the instant one. In contrast, Vandalia's period of waiver for incumbents is eighteen months long (approximately 548 days), which is more than six times longer than Minnesota's ROFR. J.A.9. Therefore, the burdens of Vandalia's ROFR significantly outweigh the purported benefits "to ensure coal's continued dominance" in violation of the DCC. J.A.6. Thus, the lower court did not sufficiently examine the extent of the burdens imposed, and as a result, their conclusion that the benefits outweighed the burdens on interstate commerce is erroneous.

## II. ACES HAS STANDING TO CHALLENGE THE CFO AS THE CAUSE OF A CONCRETE ECONOMIC INJURY.

ACES has standing to challenge the CFO because the CFO causes a concrete and particularized injury that is redressable by this court. The doctrine of standing stems from Article III §1 of the U.S. Constitution which limits the jurisdiction of the federal courts to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559 (1992). In order to have standing to bring a lawsuit, three Constitutional elements must be satisfied: injury, causation, and redressability. *Id.* at 560–561. The injury must be concrete and particularized, and actual or imminent. *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 180

(2000); *see also United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 688–689 (1973) (holding the harm to be sufficiently "specific and perceptible" where students challenged an increased freight rate that lead to an increased use of nonrecyclables, which would have an adverse impact on the environment due to an increased use of natural resources to produce those nonrecyclables).

Further, the injury must be "fairly traceable" to the challenged action and redressability by a favorable decision must be "likely." *Laidlaw*, 528 U.S. at 180–181. In *Allco Finance Ltd. v. Klee*, the court held that a developer who was ineligible to be a provider of energy met the injury requirement to challenge the State regulation that deemed them ineligible. 861 F.3d 82, 95 (2d Cir. 2017). Further, the Court found that the plaintiff met redressability by seeking a declaration that the State policy was preempted by the FPA. *Id.* at 96. ACES has similarly met the injury requirement as an electricity provider that is denied the opportunity to compete equally in the PJM market. Redressability requirement is satisfied even more clearly than in *Allco* as ACES is requesting the court invalidate the CFO on constitutional grounds.

ACES suffers a concrete and particularized economic injury because of the CFO. There are two potential pathways for the CFO to economically injure ACES. First, because the CFO exclusively allows economic recovery to LastEnergy and MAPCo, ACES is economically disadvantaged. J.A. 8. If, in complying with the CFO, LastEnergy or MAPCo do not recover the full cost of operating their coal-fired power plants at seventy-five percent capacity, they are authorized to charge a higher retail rate to recoup the lost costs. *Id.* This fail-safe incentivizes LastEnergy and MAPCo to bid into the auction at lower prices to ensure that they clear the auction without a fear of lost profit. Further, by bidding at a low price, LastEnergy and MAPCo drive the market clearing price down. This lower clearing price injures ACES because they will be receiving a lower rate than if the CFO were not in place. Alternatively, ACES may be unable to clear the auction at all. It is because ACES is not subject to the CFO that they suffer a concrete and particularized economic injury.

Second, even if the economic fail-safe is not triggered, or the clearing price is not influenced, the CFO economically injures ACES by distorting the PJM capacity market. The CFO requires LastEnergy and MAPCo to operate their coal-fired power plants at a higher capacity than they would in the absence of the order. J.A. 8. LastEnergy and MAPCo then bid that increased capacity into the market, which decreases the demand for alternative sources of power.[3] This decrease in demand directly and negatively impacts ACES as it distorts the PJM market, a market that ACES is an active participant in. J.A. 4. The CFO reduces the quantity of capacity that ACES is eligible to compete for, systematically lowering the economic profit of ACES in the PJM market. As such, ACES suffers a clear economic injury due to the direct effect of the CFO on wholesale market competition.

Having shown injury, ACES clearly satisfies causation and redressability. The explained injury is clearly traceable to the CFO issued by the PSC. The relief sought is squarely within the province of this court as ACES requests the CFO be struck down as unconstitutional under the Supremacy Clause. ACES has standing to challenge the CFO as the cause of a concrete injury that is redressable through a determination that the FPA preempts the CFO.

## III. THE CAPACITY FACTOR ORDER AND RIGHT OF FIRST REFUSAL VIOLATE THE SUPREMACY CLAUSE AND ARE PREEMPTED.

Federal laws preempt state action under the Supremacy Clause of the U. S. Constitution which provides that "the Laws of the United States . . . shall be the supreme Law of the Land."

[3] For example, if LastEnergy and MAPCo bid only the quantity of capacity that was projected in their PCA filings, they would have collectively bid 125% less than what was bid under the CFO mandate of 75% per power plant.

U.S. CONST. ART. VI, CL. II. In examining a question of preemption, "the purpose of Congress is the ultimate touchstone." *Atria Group v. Good*, 555 U.S. 70, 79 (2008). From this, the Supreme Court has articulated express preemption, field preemption, and conflict preemption. *See Lorillard Tobacco v. Reilly*, 533 U.S. 525, 541 (2001).

Field preemption occurs when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Northwest Central Pipeline. v. State Commission of Kansas*, 489 U.S. 493, 509 (1989). Conflict preemption occurs when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok v. Learjet*, 575 U.S. 373, 377 (2015) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100–101 (1989)). The CFO is expressly preempted and field preempted by the FPA and the ROFR is conflict-preempted for the following reasons.

### A. The Capacity Factor Order violates the Supremacy Clause and is preempted by the Federal Power Act.

The Federal Power Act ("FPA") preempts the CFO because it is regulating in a field expressly reserved by Congress to FERC. The FPA creates an explicit division in regulatory authority between the federal government and the states. Under the FPA, FERC is granted jurisdiction to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Further, "[a]ll rates and charges made, demanded, or received by any public utility for *or in connection with* the transmission or sale of electric energy subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." 16 U.S.C. § 824(d) (emphasis added). Regulation of intrastate electricity markets and retail sales is left to the states. 16 U.S.C. § 824(b)(1). The Supreme Court in *Mississippi Power & Light v. Moore* articulated three fundamental principles that govern preemption questions regarding the federal and state divide over wholesale rates, two of which are relevant here. 487 U.S. 354, 371 (1988). First, “FERC has exclusive authority to determine the reasonableness of wholesale rates.” *Id.* Second, that authority extends to “power allocations that affect wholesale rates.” *Id.* The PJM capacity auction falls squarely within the jurisdiction of FERC as a mechanism for wholesale rate setting. *Hughes v. Talen*, 578 U.S. 150, 157 (2016). The auction was explicitly designed by FERC to encourage competition in the market and generate “a just and reasonable clearing price.” *Id.* The CFO infringes on FERC’s jurisdiction by questioning the reasonableness of the clearing price and by influencing wholesale rates through power allocation.

A State action that regulates wholesale rates by guaranteeing a rate distinct from the clearing price, is preempted by the FPA. In *Hughes v. Talen*, the Supreme Court held a Maryland Order invalid and preempted by the FPA because it set an interstate wholesale rate. 578 U.S. at 164. Maryland had implemented an order to encourage new in-state sources of electricity by requiring third party “load serving entities” to enter into a pricing contract with the new power plant, CPV, at a set rate for twenty years. *Id.* at 158. CPV was guaranteed the contract price, regardless of the auction clearing price, as long as they participated in the PJM auction. *Id.* at 159. If the clearing price was below the contract price, the load serving entities would pay back the difference regardless. *Id.* at 159.

The Supreme Court held that Maryland had overstepped into FERC’s regulatory jurisdiction because it “functionally sets the rate that CPV receives . . . in the auction” and “strikes at the heart of [FERC’s] statutory power.” *Id*. at 162–163. The Maryland Order provided a rate to CPV that contradicted the clearing price which FERC authorizes as “*per se* just and reasonable.” *Id.* at 163. The Court held that, while Maryland’s policy goal was a legitimate exercise of State authority, "[s]tates may not seek to achieve ends, however, legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Id.* at 164; *see also Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 966 (1986) (holding a State may not use its authority to set retail rates to supersede the wholesale rates FERC has established as just and reasonable). Thus, state regulatory action is field preempted when it undermines the wholesale rates established through FERC's authority.

As such, the CFO is preempted because it intrudes on FERC's exclusive authority to govern wholesale rates. Similarly to CPV in *Hughes*, LastEnergy and MAPCo are being promised rates distinct from the clearing price. J.A. 8. If the clearing price is less than the cost incurred to produce the mandated capacity, the CFO allows LastEnergy and MAPCo to recover the difference. *Id.* As in *Hughes*, this cost recovery mechanism clashes with FERC's authority to determine just and reasonable wholesale rates. While the policy goal of the CFO is in alignment with Vandalia's authority over in-state generation, not unlike the Maryland Order, the means used to achieve increased coal power transgresses into FERC's jurisdiction. The CFO is preempted because it sets a wholesale rate for LastEnergy and MAPCo that is contrary to the FERC authorized clearing price.

The CFO is preempted by the FPA because it has a direct tether to the wholesale market. Because the wholesale and retail electricity markets are "inextricably linked," courts often are tasked with resolving the tension between federal and state authority in the energy sector. *FERC v. Electric Power Supply Association*, 577 U.S. 260, 265 (2016). States may regulate energy generation in alignment with their own policy goals, so long as the regulation is "untethered" to wholesale markets and does not clash with federal goals. *Electric Power Supply Association v. Star*, 904 F.3d 518, 523 (7th Cir. 2018) (*citing Hughes*, 578 U.S. at 165).

The PSC mistakenly analogizes the CFO to zero-emissions credits ("ZECs"). ZECs are a state issued economic credit granted to nuclear plants for the "environmental attributes" of zero-emission electricity generation. *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 45 (2d Cir. 2018). ZECs are designed to encourage nuclear power generation despite the economic barriers these utilities face. *Id.* at 46. To receive a ZEC, the nuclear plant is required only to *generate* power, it does not require participation in the wholesale auction. *Star*, 904 F.3d at 523–24. Further, the monetary value of the ZEC does not depend on the clearing price of the auction—it is determined primarily based on the social cost of carbon, which is independent of wholesale market values. *Coalition*, 906 F.3d at 51; *Star*, 904 F.3d at 523. Thus, unlike Vandalia's CFO, the ZECs are a permissible state action because they do not affect wholesale rates, nor compel market participation. *Coalition*, 906 F.3d at 51; *Star*, 904 F.3d at 523.

The CFO is preempted because it is distinguishable from ZECs in several important regards. *First*, the CFO regulates the capacity of utilities and ties the potential increased rate to the cost of mandated production, whereas the ZECs stem from the "environmental attributes" associated with nuclear power generation, not costs incurred through energy production. J.A. 8.

*Second*, the only factor that is used to determine the value that LastEnergy and MAPCo can recover is the wholesale clearing price, whereas ZECs rely on other independent factors. *Id.* The PSC may have a permissible policy goal in maximizing coal-fired power, but the CFO violates the federal goal of promoting competition in wholesale markets. J.A. 6; 13. In order to satisfy the CFO, LastEnergy and MAPCo must sell their capacity into the PJM capacity auction. J.A. 8. This coercion is directly contrary to FERC's extensive regulation of the PJM market and is outside the PSC's regulatory authority.

*Finally*, by requiring the utilities to operate their coal-fired plants at seventy-five percent capacity, the CFO regulates allocation of power in the market, in violation of a fundamental principle of the split between State and federal authority. J.A. 8. The CFO is setting a unique wholesale rate, is compelling wholesale market participation, and is allocating power within the PJM market, all in violation of FERC's authority. Accordingly, the FPA preempts the CFO.

### B. Vandalia's ROFR is unconstitutional because it conflicts with FERC Order 1000 and the FPA and is conflict-preempted.

Vandalia's ROFR is unconstitutional and preempted because (1) Vandalia's ROFR is conflict-preempted and (2) FERC preempted state ROFRs by acting within its delegated authority. Vandalia's ROFR is preempted because it conflicts with FERC Order 1000 and the FPA. The U.S. Supreme Court has held that state laws that impede accomplishment of Congress' "accomplishment and execution of full purposes and objectives" are preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Courts find conflict preemption when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142–143 (1963); *see Geier v. American Honda Motor*, 529 U.S. 861, 884-885 (2000) (holding state tort action conflict-preempted by Dept. of Transportation regulations); *Pliva v. Mensing*, 564 U.S. 604, 626 (2011) (holding state tort action conflict-preempted by FDA regulations). In the context of administrative agencies, conflict preemption turns on "identification of actual conflict. . .but does not require a specific, formal agency statement identifying conflict." *Geier*, 529 U.S. at 884-885. Here, it is impossible to comply with both Vandalia's ROFR and FERC's order 1000, which abolishes ROFRs. Vandalia's ROFR is thus conflict-preempted.

To begin, Vandalia's ROFR conflicts with the goals of both Order 1000 and the FPA. In promulgating Order 1000, FERC explained it was abolishing ROFRs to *eliminate* "undue discrimination, preferential treatment against nonincumbent transmission developers, anticompetitive practices, and barriers to competition." *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, [hereinafter Order No. 1000] ¶286. Vandalia's ROFR conflicts with these goals by *promoting* undue discrimination, preferential treatment of incumbents, anti-competitive practices, and barriers to competition; it is thus preempted. Moreover, in *Gade v. National Solid Waste Management Association*, the Court held that state regulation of occupational health and safety regulations was conflict-preempted by the OSH Act, because of statutory design and congressional intent, since "state law also is preempted if it interferes with the methods by which the federal statute was designed to reach th[at] goal." 505 U.S. 88, 103 (1992). Similar to *Gade* where state law was preempted when it interfered with administrative agency regulations, in the instant case, Vandalia's ROFR interferes with, and is in direct conflict with, FERC's Order 1000, and is preempted.

Vandalia's ROFR also conflicts with the goals and objectives of the FPA. The FPA provides that FERC's jurisdiction extends to "the transmission of electric energy in **interstate** commerce." 16 U.S.C. § 824(a) (emphasis added). However, the FPA notes that "federal regulation extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). The FPA later defines "matters. . . subject to regulation by the States" as "facilities used for. . . generation . . . local distribution or only for the transmission of electric energy in *intrastate* commerce." 16 U.S.C. § 824(b) (emphasis added). Here, Vandalia's transmission of electric energy is not intrastate, but rather is **interstate**, and is thus subject to regulation by FERC under the FPA. *See* 16 U.S.C. §824(c) (defining **interstate** transmission of electricity as "energy . . .transmitted from a State and consumed at any point outside thereof") (emphasis added); J.A.4 ("Vandalia is among the top states in **interstate** transfers of electricity.") Therefore, Vandalia's transmission market is subject to FERC's authority to undo "any rule, regulation, practice, or contract affecting [a] rate, charge, or classification [that] is unjust, unreasonable, unduly discriminatory or *preferential*." 16 U.S.C. § 824e(a) (emphasis added). In the instant case, Vandalia's ROFR is "unduly . . . preferential" as it only permits incumbent utilities to construct transmission infrastructure; this blatantly conflicts with the FPA and is thus conflict-preempted.

Further, in *Public Utility District Number 1 v. IDACORP*, the Ninth Circuit found that state law was conflict-preempted, reasoning that state contract law "would interfere with the method by which the federal statute was designed to reach it goals . . . [and] would create a conflict with FERC's authority. . .[by] mak[ing] state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the FPA." 379 F.3d 641, 650 (9th Cir. 2004). Similarly, Vandalia's ROFR conflicts with FERC's authority and is an obstacle to congressional purposes and objectives under the FPA. *See* 16 U.S.C. §§ 791 et seq.

The legislative purpose of Vandalia's ROFR affirms the significance of its conflict with FERC's Order 1000 and the FPA. The legislative purpose of Vandalia's ROFR is to "ensure coal's continued dominance as a source of energy, encourage . . .  development of utility resources … consistent with. . . the productive use of the state's energy resources, such as coal . . . ensure no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." J.A.6, Vand. Code §§ 24-1-1(a)(3), 24-1-1D(5), 24-1-1D(12). In contrast, FERC noted its primary concern in removing federal ROFRs was that, without doing so,  "transmission projects. . . may be developed at a higher cost than necessary. . . regional transmission services may be provided at rates, terms and conditions that are not just and reasonable." Order No. 1000, ¶270. The purpose of Vandalia's ROFR to ensure coal's dominance *at any cost* is incompatible with the purposes of Order 1000 and the FPA, which charge FERC to ensure just and reasonable rates that are *not* unduly discriminatory or preferential. 16 U.S.C. §§ 824e(a). Therefore, Vandalia's ROFR is conflict-preempted.

### C. Vandalia's ROFR is unconstitutional because ROFRs were eliminated by FERC Order 1000, which preempts Vandalia's ROFR.

Vandalia's ROFR has been eliminated by Order 1000 and the FPA. Federal administrative agencies preempt state action when the agency "act[s] within the scope of its congressionally delegated authority." *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986)). Here, Order 1000 is within the scope of authority delegated to FERC by Congress, and abolishes ROFRs for areas "selected in a regional transmission plan for purposes of cost allocation" while exempting "transmission facilities in local transmission plans." *See generally* Order No. 1000. Because Vandalia's ROFR is subject to Order 1000, which eliminates federal ROFRs, Vandalia's ROFR is preempted for three reasons. First, Order 1000 is "within the scope of [FERC's] congressionally delegated authority." Second, Vandalia's transmission infrastructure is regional and interstate, and thus subject to Order 1000, which eliminates ROFRs for regional transmission infrastructure. Third, the transmission infrastructure at issue is not purely local, so the local facility exemption does not apply. Therefore, FERC's Order 1000 preempts Vandalia's ROFR.

#### *1. Vandalia's ROFR is preempted because FERC acted within the scope of the authority delegated to it by Congress under the FPA.*

Vandalia's ROFR is preempted by FERC's Order 1000. Under the FPA, Congress designated FERC as the sole regulator of ''the transmission of electric energy in interstate commerce." 16 U.S.C. § 824(a). FERC's power to regulate transmission extends to both retail and wholesale markets due to the interstate nature of the national grid. *New York v. FERC*, 535 U.S. at 17. Order 1000 builds upon this authority, eliminating ROFRs for transmission infrastructure subject to FERC's jurisdiction. *See* Order No. 1000, ¶7, 225, 228. Therefore, FERC has squarely "act[ed] within the scope of its congressionally delegated authority" in promulgating Order 1000 and as such, Vandalia's ROFR is preempted.

*2. Vandalia's transmission infrastructure is regional and interstate in nature.*

Vandalia's transmission facilities are subject to Order 1000's elimination of ROFRs because they are both regional and interstate. In abolishing federal ROFRs, FERC noted that it would violate its statutory objectives "to deny a nonincumbent public utility transmission developer that sponsors a project that is in a *regional* transmission plan the rights of an incumbent public utility transmission developer. . . subject to the Commission's jurisdiction." Order No. 1000, ¶270 (emphasis added). Thus, Order 1000 removes federal ROFRs from areas "selected in a regional transmission plan for purposes of cost allocation" but exempts local transmission facilities. Order No. 1000, ¶7, 225, 228. The transmission facilities at issue are subject to Order 1000's elimination of ROFRs because they are *interstate* transmission facilities used for *regional* transmission planning, and thus are subject to the FERC's jurisdiction.

To begin, the transmission infrastructure at issue is exactly the type of facility for which FERC abolished ROFRs. FERC eradicated ROFRs for areas "selected in a *regional* transmission plan for purposes of cost allocation," which, according to FERC is "[a transmission facility] that has been selected, pursuant to a Commission-approved *regional* transmission planning process, as a more efficient or cost-effective solution to regional transmission needs." Order No. 1000, ¶6 (emphasis added). The transmission infrastructure that ACES was approved to build falls into this category and *is* involved in "a regional transmission plan for purposes of cost allocation."

This is because ACES' transmission infrastructure in Vandalia was part of "a competitive planning process for new transmission facilities to implement FERC Order 1000." J.A.6. Further, ACES' transmission line, the Mountaineer Express, was "approved for inclusion in the regional transmission expansion plan 'to encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system.'" J.A.6. Moreover, ACES transmission infrastructure is *regional and inter-regional* in nature, as it would connect Vandalia to transmission lines delivering power across 460 miles from Pennsylvania to North Carolina. J.A.5. This is squarely the type of transmission infrastructure that FERC sought to eliminate ROFRs for in issuing Order 1000.

Moreover, in *Public Service Electric & Gas v. FERC*, the D.C. Circuit held that electrical transmission companies operating as incumbent members of PJM did not have a ROFR and PJM could "designate third-party developers to construct transmission facilities within incumbent members' zones." 783 F.3d 1270, 1271 (2015). Similarly, Vandalia incumbent utilities, all of which are PJM members, do not retain an ROFR because it has been quashed by Order 1000.

Finally, the fact that Order 1000 notes that it is not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities," does not save Vandalia's ROFR. Order No. 1000, ¶227. In promulgating Order 1000, FERC extinguished ROFRs for transmission facilities, so while states *may* be legally able to implement an ROFR, this does not guarantee an ROFR protection from being invalidated by a court or by  FERC. As FERC noted, "it does not follow that the Commission has no authority to remove such restrictions in [laws] subject to its jurisdiction." *Id.* As such, this Court should remove Vandalia's ROFR because it is preempted.

*3. Vandalia's ROFR is preempted by FERC because the transmission infrastructure at issue DOES NOT qualify for Order 1000's "local facility" exemption.*

The "local facility" exemption does NOT apply to Vandalia's transmission infrastructure. *See* Order No. 1000, ¶7, 226 (noting the eradication of ROFRs does not apply to "transmission facilities in local transmission plans that are merely "rolled up" and listed in a regional transmission plan without going through an analysis at the regional level"). Here, the local exception does not apply, because both of Vandalia's public utilities serve several other states, indicating they are not "local." J.A.4. Further, the transmission market in Vandalia is purely *interstate*, as Vandalia is a net supplier of electricity to the *regional* grid and is a top state for interstate transfers of electricity. J.A.4. Finally, as the D.C Circuit noted in *LSP Transmission Holdings II v. FERC*, cost allocation cannot be categorized as solely local if no attempt was made to examine the *regional* nature of transmission, because this encourages a "head-in-the-sand approach." 45 F.4th 979, 997 (D.C Cir. 2022). Therefore, the transmission infrastructure does not qualify for the "local facility" exemption.

The PSC offers the case of *Miso Transmission Owners v. FERC*, which treated the retail distribution service areas of an electrical company that spanned multiple states as a single "local" market exempted from FERC Order 1000. 819 F.3d 329, 337 (7th Cir. 2016). The Court reasoned that the pertinent company was "local" rather than "regional" because "the separate operating companies actually operate as one and have so operated for more than fifty years." *Id.* Further, the entity at issue there was a public utility that served only four states. *Id.* Treating a retail utility that spans multiple states as "local" under this rationale is inapplicable to the instant case, because there are *two*– LastEnergy and MAPCo– rather than one retail utilities operating in Vandalia, and their service areas overlap and diverge in part, so they do not "operate as one."

J.A.4. Additionally, LastEnergy and MAPCo's service areas are more vast, serving six and eight states respectively (LastEnergy serves Ohio, Pennsylvania, Maryland, New Jersey, West Virginia, and Vandalia, while MAPCo serves Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, West Virginia, and Vandalia). J.A.4. Therefore, under the reasoning in *Miso Transmission Owners*, LastEnergy and MAPCo would not be treated as "local" because they overlap in service territory, do not "actually operate as one," and serve larger interstate service areas. Hence, Vandalia's ROFR is preempted.

## CONCLUSION

Because Vandalia's regulatory efforts violate the U.S. Constitution, we ask that this Court overturn the lower court's grant of the motion to dismiss on all issues.

Respectfully submitted,

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Counsel for Appalachian
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February 1, 2023

**CERTIFICATE OF SERVICE**

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

Respectfully submitted,

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