# C.A. No. 22-0682

United States Court of Appeals for the Twelfth Circuit

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Plaintiff-Appellant,

-against-

CHAIRMAN WILL WILLIAMSON
In his official capacity,
COMMISSIONER LONNIE LOGAN
*In his official capacity,*
COMMISSIONER EVELYN ELKINS,
*In his official capacity*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VANDALIA

BRIEF FOR THE APPELLEE

TEAM NUMBER 18
FEBRUARY 1, 2023

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## JURISDICTIONAL STATEMENT

This court has jurisdiction over each of the proceedings consolidated in this case. The District Court had authority over the first action under federal question jurisdiction 28 U.S.C. §1331 as the claims arose as an alleged violation of federal law under the Constitution. The District Court was authorized to hear the case under federal question jurisdiction because the plaintiff-appellees, Appalachian Clean Energy Solutions ("ACES"), allege that the laws enacted by the state of Vandalia violate the Supremacy Clause and the dormant Commerce Clause of the Constitution. After the district court granted motions to dismiss as to all of the claims, which were subsequently granted, ACES filed a timely appeal of the dismissals, so this court has jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED

(1) Does Appalachian Clean Energy Solutions, a global utility company, have standing to challenge a Capacity Factor Order ("CFO) decreed by Vandalia's Public Service Commission ("PSC") to which it is not subject to because it is not a coal plant operating in Vandalia—but solely because that is not subject to the PSC's Capacity Factor Order, have standing to challenge it?

(2) (a) If ACES has standing, is the Capacity Factor Order preempted by the laws of the Federal Energy Regulatory Commission's ("FERC") Federal Power Act, and therefore in violation of the Supremacy Clause?

(b) Is Vandalia's statutory Right of First Refusal ("ROFR") preempted by FERC Order 1000, and therefore in violation of the Supremacy Clause?

3) Is the PSC's Right of First Refusal preempted by the dormant Commerce Clause?

## STATEMENT OF THE CASE

### Procedural History

The plaintiff-appellant, Appalachian Clean Energy Solutions ("ACES"), appeals from a motion to dismiss on all four issues granted by the U.S. District Court for the Northern District of Vandalia. The first motion to dismiss for failure to state a claim was filed by the defendant-appellee, the Vandalia Public Service Commission ("PSC"), on the grounds that ACES did not have standing to challenge the Capacity Factor Order, and even if standing had been established, the Capacity Factor Order was not preempted. The PSC also filed a motion to dismiss as to the third and fourth claims, which were subsequently granted on the same day—August 15, 2022—because the court found that the Right of First Refusal was not preempted and did not violate the dormant Commerce Clause of the U.S. Constitution. ACES filed a timely appeal as to both motions on August 29, 2022.

### Statement of Facts

Vandalia is a state rich with energy and boasts a long history of coal mining. With the advent of shale production in Vandalia, the coal industry has been on the decline, but is still prominent enough for the state to be the third-largest coal producer in the nation. Despite producing coal in sufficient amounts for its own residents, Vandalia transmits about half of its total production to out of the state.

The energy market and the ways in which it functions are complicated, both in Vandalia and throughout the United States. There are many entities that work together—from the municipal level all the way up to the federal level. As standard practice in the United States, energy companies generate energy and then sell it to independent regional transmission organizations ("RTO's") which then maintain and operate transmission grids across the country. The PJM interconnection, an RTO, serves the state of Vandalia and several other states and the District of Columbia.

The PJM is also responsible for operating the applicable energy and capacity markets, which enable PJM to buy and sell electricity to distributors for eventual use by consumers. All generators of power in Vandalia are connected to PJM and are contractually obligated to sell all of the energy they produce into the PJM energy market. There are state and federal laws that prescribe how PJM and the utilities must use an auction to determine wholesale prices of power. As for the capacity market, its goal is to ensure that there is sufficient capacity being built ahead of time to meet demand.

There are two retail utilities that serve the state of Vandalia, LastEnergy and Mid-Atlantic Power Co. ("MAPCo."). Both LastEnergy and MAPCo. are headquartered in states outside of Vandalia and serve several states across the Mid-Atlantic and Midwest regions of the country. LastEnergy operates two coal-fired power plants in our state and MAPCo. three; together they serve over one million customers in Vandalia.

Appalachian Clean Energy Solutions, Inc. is a global energy company that constructs and operates electricity generating plants and interstate electric transmission lines; it seeks to construct a natural-gas fired electric generating plant, the Rogersville Energy Center in Pennsylvania. To build this plant, it needs to construct an electric transmission line, Mountaineer Express, which would run through Vandalia. The Mountaineer Express was approved for construction by PJM.

As alluded to, there are various levels of governance and regulation surrounding the energy sector. In Vandalia, it is the Public Service Commission ("PSC") that is tasked with regulating the rates and practices of utilities providing retail service within the state of Vandalia and is granted statutory authority to set "just and reasonable rates" for the utilities and regulating the practices, services, and rates of public utilities to "provide the availability of adequate, economical, and reliable utility services." (*R.* at 6). The Commission is comprised of three commissioners, all of whom are political appointees.

At the federal level, the Federal Power Act ("FPA") created the Federal Energy Regulatory Commission ("FERC") which regulates interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. See 16 U.S.C. §824(b)(1). FERC's initiatives created the RTO's and eventually led to the PJM.

LastEnergy and MAPCo. annually submit filings with information about their power cost mechanisms and their capacity factors for the past year; for the period ending in June of 2021, both utilities projected that their plants would be operating at a maximum capacity of sixty percent. They cited to the availability of cheaper power from the wholesale market and from other energy suppliers in the mid-Atlantic region. This effectively meant that both utilities were displacing more expensive coal-fired generation with some cheaper sources of energy.

The Commission was apprehensive about how the low capacity factors may affect the coal industry in Vandalia. In the interest of maximizing generation from the coal-fired power plants in the state, the PSC issued a Capacity Factor Order in May of 2022 directing LastEnergy and MAPCo. to operate at a seventy-five percent capacity factor. Furthermore, the PSC was able to include a finding of fact that operation of the coal-fired plants at the requisite seventy-five percent capacity would be economical, thereby not unduly impacting the energy market.

In May 2014, the Vandalia legislature passed the Native Transmission Protection Act (NTPA) granting incumbent transmission owners an 18-month exclusive right to construct proposed transmission lines. Vandalia defines "incumbent [electric transmission owner]" as a "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…or any other entity engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia. Due to this law, the PSC has not acted upon ACES' application to construct its transmission line through Vandalia. LastEnergy and MAPCo. have eighteen months to potentially exercise their ROFR. The PSC also determined that ACES does not satisfy the statutory criteria to be designated as a "public utility," which ACES fears is an omen that the PSC will not grant its application to construct the Mountaineer Express through parts of the state.

## SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Twelfth Circuit should uphold the District Court's dismissals. The District Court correctly held that ACES lacked standing to challenge the Vandalia Public Service Commission's Capacity Factor Order; it also correctly identified that there was a lack of conflict between state and federal law sufficient to evoke the Supremacy Clause with regard to the CFO and the statutory ROFR; and determined that the ROFR did not violate the dormant Commerce Clause of the U.S. Constitution., and properly rejected the Fifth Circuit approach to state rights of first refusal law.

**Issue I**

First, to establish Article III standing, ACES must establish three things: "(1) injury-in-fact, which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) causation in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008).

**Issue II**

ACES failed to stake out a successful Supremacy Clause challenge to both the PSC Capacity Factor Order and the ROFR contained within the NTPA. In order to successfully evoke the Supremacy Clause, ACES must show one or more of the following: 1) an express statement from Congress explicitly intending to preempt state law; 2) Congress's implied purpose to preempt state law; 3) that Congress so heavily regulates the field of transmission line permitting and construction that no state could supplement these regulations without interfering with the purpose of the regulatory scheme; 4) that complying with both state and federal law would be impossible; or finally that 5) complying with state law would produce clear damage to federal aims and objectives. ACES must also overcome the 'presumption against preemption'. In the arguments advanced in the court below, ACES had been unable to establish any of the aforementioned criteria that would deem the Capacity Factor Order and ROFR contrary to federal law.

**Issue III**

ACES attempts to analogize the present case to a Fifth Circuit case regarding a dissimilar Texas statute. However, a nearly identical Minnesota statute was recently upheld by the Eigth Circuit. Ultimately, ACES must either show that 1) the NTPA facially discriminates against non-incumbent utilities or that 2) the law fails the *Pike* Balancing Test. The NTPA does not facially discriminate because ACES and the incumbent utilities are not similarly situated within the energy market and the NTPA is merely a regulation of business practices. The NTPA survives the *Pike* Test because the local interest of protecting access to efficient and inexpensive energy outweighs the negligible, if any, impediments to interstate commerce.

## ARGUMENT

### Standard of Review

Appellate review of the District Court's legal determination is de novo as the review is based on a dismissal of a complaint for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). See *Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 259 (2d Cir. 2006). The Supreme Court in *Ashcroft v. Iqbal* held that in order to withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

### I. ACES does not have standing to challenge PSC's Capacity Factor Order

Appalachian Clean Energy Solutions ("ACES") does not have standing to challenge PSC's Capacity Order. Article III standing requires a plaintiff to have (i) suffered actual injury; (ii) caused by the defendant; and (iii) has a probability of being redressed by a judgement favorable to the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2134, 119 L. Ed. 2d 351 (1992). Failure to establish even one prong is fatal to the claim—here, the plaintiff fails to meet all three.

#### A. ACES cannot show injury

To show injury in fact, ACES must establish a concrete and particularized harm. More clearly, ACES must show an actual or imminent invasion of a legally protected interest that affects it in a "personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). At the pleading stage, "the plaintiff must clearly allege facts demonstrating each element." *Id.* at 338. (internal quotations and ellipses omitted). Here, ACES cannot meet the injury-in-fact requirement because (1) any harm is purely hypothetical, not concrete and (2) even if it did occur, it would not affect ACES in any individualized way.

First, ACES cannot show that the Capacity Factor Order ("CFO") has harmed it in any way. Most obviously, ACES merely alleges that the CFO "*will* seriously distort the PJM auction price's signals." (*R.* at 14). ACES does not, and cannot, allege that the CFO has already affected the market or their business, they simply rely upon predictions of what could happen to the market in the future. This makes ACES quite unlike the plaintiffs in *Allco Fin. Ltd. v. Klee*, 861 F. 3d 82 (2nd Cir. 2017). There, the Second Circuit found that the plaintiffs were injured because they were able to allege that had Connecticut not introduced its minimum size requirement and unlawful fees, they would have accepted the plaintiff's bids. *Id.* at 95. Thus, unlike for ACES, the injury had already occurred, so the plaintiffs were not making speculative claims about the future. Any concreteness argument about the CFO affecting the economics of the Rogersville plant would be similarly unavailing. As explained above, the impact of the CFO is not yet clear, so ACES cannot say with any certainty that its plant will become uneconomical. ACES' future injury is simply too speculative to satisfy the well-established requirement that the threatened injury must be certainly impending. See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

Further, the PSC data reflects that coal plants can run economically at 75% capacity, thus even absent the order, this effect on the markets might still occur. Nor can ACES argue that the CFO causes it to pay higher costs or receive lower prices. ACES is not a ratepayer, so any effect that the CFO has on price will not be reflected on ACES' balance sheet. And because ACES is not a retailer, its sale of electricity is also unaffected by the CFO.

ACES also fails to demonstrate how it has been injured in any individualized way. Because ACES cannot show that the CFO actually harms its business, it has to fall back to saying that the CFO harms the ability of the FERC to achieve its goals under the FPA. (*R.* at 14.) But the PSC's interference with the FERC's regulatory scheme, if it exists, is a problem that the FERC has standing to address, not ACES. Interference with FERC's scheme and the principles of ordered federalism no more harms ACES than it does the principal of the Rogersville Middle School. In other words, any affront to ACES caused by the CFO is "undifferentiated and common to all members of the public" which plainly is not enough to give it standing. *United States v. Richardson*, 418 U.S. 166, 177 (1974).

ACES may argue that because there has not been an auction yet in the last few months since the promulgation of the CFO, they have not seen the market effects and thus have not been able to establish injury. However, three months have passed and if there were to be market distortions, we would have seen them present themselves by one means or another. And ACES has not established that there is an imminent auction with any reason to doubt that the market has fluctuated due to the CFO.

ACES may proceed under one or both of two theories in their attempt to establish injury: they may assert that they have already suffered a concrete and particularized injury as a result of the price distortions in the market as a result of the CFO. The second theory is that they risk imminent injury by the CFO's distortion of the market leading to a denial of their request to construct a transmission line through Vandalia. Neither of these theories are viable because the price distortions are not concrete—ACES in the arguments advanced at the district court had put forth no evidence showing that the markets had suffered any discernible price fluctuations as a result of the CFO. ACES had also not shown that the price distortions were particularized; they did not affect ACES in a personal and individualized way or simply at all because ACES is neither a ratepayer, nor a coal-fired power plant directed to follow the CFO. *Spokeo, Inc. v. Robins,* 578 U.S. 330, 136 S. Ct. 1540, 1543, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

### B. Causation

ACES has not established any injury in fact—therefore there is no need to examine whether the injury arose as a result challenged conduct of the Public Service Commission.

However—if ACES were to establish injury—either in the form that it had occurred or there was a substantial and imminent risk of injury—causation would be a hurdle for them to clear as well. The injury that ACES asserts, if it were to be that the Capacity Factor Order led to distortions of the wholesale market, would have to be fairly traceable to the effects of the Order. See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). ACES would need to show a direct causal link between the Order and its presumably deleterious effects on the wholesale energy market. After considering the number of variables that are factored into the wholesale energy, it will likely be difficult to show that, if there are any distortions, they are exclusively or primarily caused by the Order.

It will be no easier for ACES to establish that their hypothetical impending injury was caused by the Order—especially if their alleged injury is the PSC's denial of their requested right of way…

### C. ACES will not be able to show redressability as a requisite for standing

The final prong of standing to establish standing is redressability. ACES must be able to show that the injury is likely to be redressed by a decision favorable to them. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). If ACES was able to establish that it suffered an injury because the Capacity Factor Order and Right of First Refusal affected the allowance of its high voltage transmission line and entry into the Vandalia utility market—it would need to show that the repeal of both laws would redress its injury, presumably through showing that it would be granted access into the Vandalia market.

For their claim that the PSC's Capacity Factor Order or Right of First Refusal will impact the construction of the Rogersville Energy Center: there is little evidence to show that the Capacity Factor Order and the ROFR are the sole impediments keeping ACES from entering the Vandalia market. Furthermore—it has not been shown with uncertain or with substantial likelihood that either MAPCo. or LastEnergy will exercise their right of first refusal, and if they do not—then the issue may become moot. Because it is unlikely that ACES will be able to establish the requisite injury of impending injury; that that hypothetical injury is fairly traceable to the actions of the PSC; and that their potential injury will be redressed by the repeal of the Capacity Factor Order and ROFR—ACES will most likely not have Art. III standing to challenge the actions of the PSC.

However—because the PSC had findings that made clear that MAPCo's. and LastEnergy's operations at 75% capacity was economical, ACES will not be able to establish that the order is an economical hindrance, and one that hurts the energy market in Vandalia. Because this further hurts the injury argument and causation—it is likely that the sought-after outcome by ACES in this action will be able to redress any claims they may have.

In sum, ACES has failed to satisfy the three prongs (injury, causation, and redressability) necessary to establish standing.

## II. Vandalia PSC's Capacity Factor Order and statutory ROFR are not preempted by the actions of the FERC and as such do not violate the Supremacy Clause of the U.S. Constitution

Under the Supremacy Clause, federal law preempts state law—in other words, federal law prevails over state law anytime the two are in conflict. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land…)". A court reviewing a preemption claim should be "guided by the rule that the purpose of Congress is the ultimate touchstone in every preemption case." *Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 162-163 (2016) (quoting *Altria Grp. Inc. v. Good*, 555 U.S. 70, 76 (2008)). Thus a state law is preempted only if displacing state authority was Congress' "clear and manifest purpose." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also* La. Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368 (1986).

The FPA does not contain an express preemption clause, so here, Congress may evince its purpose either through field or conflict preemption. See *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 95 (2d Cir. 2012) (noting the absence of express preemption in the FPA). Courts may infer field preemption when Congress "legislates comprehensively to occupy an entire field of regulation, leaving no room for States to supplement federal law" Talen, 578 U.S. at 163 (internal quotations omitted). Similarly, courts may find conflict preemption where "there is an actual conflict between state and federal law." *Altria Grp. Inc. v. Good,* 555 U.S. 70, 76–77 (2008)—practically, this requires appellant to show that it is impossible to comply with both state and federal law. *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 143 (1963).

Any analysis of pre-emption should begin with "the assumption that historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. at 77. This is particularly so in the context of the FPA, which was "drawn with meticulous regard for the continued exercise of state power," *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 50 (2d Cir. 2018) (internal quotations omitted). These are admittedly heavy burdens for appellant to meet—and on the facts of this case, it cannot rise to meet the occasion.

**A. ACES has not established Field Preemption to apply to the orders of the PSC**

The Federal Energy Regulatory Commission ("FERC") has the authority to regulate the transportation and sale of natural gas and electricity in interstate commerce, however it intentionally reserves the power to regulate production or gathering to the states. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 494 (1989).

Neither the plain language nor the legislative intent behind the FPA lead to a conclusion that Congress intended for the statute to be the exclusive authority in this area. Simply put, Congress left room for state regulation. The FPA's purpose reads as follows:

> "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." *32 A.L.R. Fed. 3d Art. 9 (Originally published in 2018).*

The statement's last clause regarding State regulation is perhaps the most informative—Congress only intended to regulate utilities as it relates transmission in interstate commerce and wholesale energy sales in interstate commerce. Congress enacted the FPA with the intent to establish a collaborative scheme between the federal and state governments to regulate energy generation: with the federal government having jurisdiction over wholesale electricity sales and its rates and the state government having jurisdiction over facilities generating energy and over general production and retail sales. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman,* 906 F.3d 41, 46 (2d Cir. 2018).

The energy sector is amenable to concurrent federal and state regulation—so long as neither encroaches on the other. There are certainly sectors and fields in which this is not possible or in which one exclusive uniform authority, the federal government, is most sensible. Tobacco advertising is one such field. The Supreme Court held that Federal Cigarette Labeling and Advertising Act preempts most state laws concerning health warnings on cigarette packaging and advertising due to the federal interest of preserving Congressional action on specific warnings to address health concerns related to smoking. See *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). However, despite federal field preemption, there this did not mean a total comprehensive prohibition on state laws regarding tobacco preemption; the federal allow government allowed states to enact generally applicable zoning restrictions on the location and size of advertisements. Id. at 525, 527. The federal government also intended field preemption as it relates to the broad grant of authority under the Federal Aviation Administration Authorization Act ("FAAAA"); the Supreme Court in Massachusetts Delivery Ass'n v. Coakley affirmed that "the FAAAA preempts state laws that 'relate to' the prices, routes, or services of a motor carrier 'with respect to the transportation of property.'" *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 23 (1st Cir. 2014). Where there are certainly federal laws that trigger field preemption, the courts have typically followed a "presumption against preemption." See *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 115, 131 L. Ed. 2d 695 (1995).

ACES argues that the Capacity Factor Order is field preempted by the FPA and cites Hughes v. Talen Energy Marketing, LLC as controlling, however Hughes should be distinguished for two reasons. First, the state law in Hughes regulated wholesale rates as opposed to the retail utility rates and whereas the state law in that case specifically regulated rates, the Vandalia is only regulating capacity and production which is not a focus of the Federal Power Act. *Hughes v. Talen Energy Mktg*., LLC, 578 U.S. 150, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016). The Supreme Court, four months earlier, held that the Federal Power Act gave FERC the authority (later specified to be exclusive authority in Hughes) to regulate wholesale electricity rates. FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 276 (2016). But regulation of 'any other sale'—i.e. any retail sale—of electricity" is beyond the authority of FERC to regulate. *Id.* at 265. "By adjusting an interstate wholesale rate, Maryland's program contravenes the FPA's division of authority between state and federal regulators. *Id.* at 150, 151, 136. There is little in Hughes to suggest that states are precluded by FERC from regulating the capacity productions of retail utilities as long as the state does not interfere with rate-setting mechanisms; the Court in no uncertain terms held that "Maryland's program is rejected only because it disregards an interstate wholesale rate required by FERC." *Id.* at 136, 150, 152. It is important to note that the Supreme Court in Hughes explicitly limited its reach and refused to comment on other state initiatives that it " "might employ to encourage development of new or clean generation, including tax incentives…or re-regulation of the energy sector…So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.* at 150, 166.

In an action similar to that of the Vandalia Public Service Commission, the PSC of New York began to issue subsidies to nuclear power plants with zero-emission attributes of electricity, as a part of its larger energy reform plan to reduce greenhouse gas-emissions. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 45 (2d Cir. 2018). When plaintiffs, a group of electrical generators, challenged the subsidies, claiming that the move influenced the prices that result from the wholesale auction (similar to the auction mechanism employed by Vandalia) and distorted the electricity market, the Second Circuit held that New York's program's incidental effect on wholesale electricity rates was insufficient to state claim for field preemption under FPA. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018).

The Vandalia PSC has broad authority to regulate the energy market—as long as it does not interfere with the federal government's laws. By way of legislative direction, the PSC is charged with the "well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state's energy resources, such as coal…it is imperative that the State of Vandalia take steps to reverse these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close…." Just as New York preferred renewable power, particularly in the form of nuclear energy, Vandalia has chosen to prefer coal energy over other forms. While ACES cites to Hughes, they failed to grasp the narrowness of that Court's holding, which does not bar the Vandalia PSC's Capacity Factor Order. Vandalia does not force utilities to enter into lengthy contracts, nor does the Order tether between the Order requiring retail coal-fired power plants to operate at 75% capacity and wholesale market participation.

The PSC's Capacity Factor Order merely regulates the retail energy market and only does so with intrastate commerce. Furthermore, the FPA makes no mention of the capacity and production of retail utilities; it only regulates transmission and the sale of such energy.

Vandalia PSC's Order affects LastEnergy and Mid-Atlantic Power Co. ("MAPCo"), which are both retail utilities. ACES seeks to make a convoluted argument that the Capacity Factor Order indirectly distorts price signals in the PJM Auction market and thereby illicitly setting a wholesale rate. However—the federal government did not intend for the reach of the FPA to be as broad and intrusive. If any party could evoke federal preemption to nullify state electricity rates—FERC could boast unbridled authority, especially in light of its vast authority over the many inputs and variables inherent to the generation and sale of electricity on a regional level.

**B. ACES has not established that the Capacity Factor Order triggers conflict preemption by contradicting the FPA.**

There are two ways to establish conflict preemption: either it must be impossible to comply with both federal and state law or the state law must pose an obstacle to the accomplishment and execution of Congress' full purposes and objectives. *See Hughes v. Talen Energy Mktg.*, LLC, 578 U.S. 150 (2016). And when the state is legitimately regulating a matter of state concern, "FERC's exercise of its authority must accommodate" that state regulation "[u]nless clear damage to federal goals would result. *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 576 (S.D.N.Y. 2017), aff'd sub nom. Coal. for Competitive Elec., Dynergy Inc. v. Zibelman, 906 F.3d 41 (2d Cir. 2018).

Congress created FERC with the authority to ensure that interstate wholesale rates are just and reasonable. *AEP Texas N. Co. v. Texas Indus. Energy Consumers*, 473 F.3d 581, 585 (5th Cir. 2006). The broad goal of the FPA is to protect the public interest as it relates to the "transmission and sale of electric energy in interstate commerce." *32 A.L.R. Fed. 3d Art. 9* (Originally published in 2018). And *In Coalition for Competitive Electricity, Dynegy Inc. v Zibelman (Zibelman*), the Court ruled that because the plaintiffs were unable to show any clear damage to federal goals, the state law was not conflict preempted. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 56 (2d Cir. 2018). The Zibelman court acknowledged that while the state law may incidentally affect wholesale rates through potential distortion of market signals, the zero-emissions credits that the state offered did not guarantee a particular wholesale rate "that displaces the auction price." *Id.* at 41, 57. Because the prices generated as a result of the zero-emissions carbon credits, if they were incidentally affected by the credits, did not clearly conflict with the auction prices—it was neither impossible for compliance with both the state and federal laws, nor did the zero-emission carbon credits clearly pose an obstacle to the goals of the federal government. The relevant case law signals that the threshold for establishing that state law conflicts with federal is a relatively high one. The courts have held that despite a state law with the potential to impact the market to the tune of billions of dollars, as long as FERC's power is unimpeded and it is still able to enforce just and reasonable rates, there is no conflict preemption. See *Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289 (N.D. Ill. July 14, 2017), aff'd sub nom. *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018).

ACES argued below that the Capacity Factor Order interfered with the goals of the Federal Power Act (FPA), without further elaboration. The Order is not in direct conflict with the FPA—there is nothing to keep an energy utility from complying with both the FPA and the Order. In the event that the Order leads to distortion of price signals in the energy market, that is not enough to establish a conflict. As seen in *Village of Old Mill Creek v. Star*, something more is needed to establish direct conflict even when the market swings by billions of dollars—and ACES has yet to allege any influence of this magnitude. ACES still has not established that the auction price without the Capacity Order would be any different than the auction price with the Order in place. Furthermore, a finding of fact yielded that the operation of coal-fired power plants at 75% capacity would be economical which suggests that the market would not be inordinately distorted, if at all.

Similar to the holdings in *Zibelman* and *Village of Old Mill Creek v. Star*, nothing in the case at bar prevents FERC from acting if they so determine that the rates produced by the Capacity Factor Order are not just and reasonable as per the goals of FERC and the FPA. Apart from the potential distortion of the market, there is nothing else to suggest interference with the goals of the federal government.

Because the Capacity Factor Order does not preclude entities from concurrent compliance with state and federal law, and nor does the Order clearly damage the goals of the federal government as they relate to setting just and reasonable prices in the energy market—the appellant has not established conflict preemption, and therefore the Capacity Factor Order is not in violation of the Supremacy Clause of the U.S. Constitution.

### C. ROFR Preemption

ACES claims FERC Order 1000 preempts the NTPA because it prohibits ISOs from granting ROFRs. ACES argument should fail, as FERC contains no explicit statement expressing Congress's intention to preempt state ROFR laws. Moreover, there is nota direct conflict of law and FERC was not intended to exclusively occupy the wholesale and retail energy market regulatory environment. There is no plausible way for ACES to overcome the 'presumption against preemption'.

#### i. FERC Order 1000 Does Not Explicitly Preempt State ROFR Law

In neither the administrative hearings dedicated to developing Order 1000 nor in Order 1000 itself is there any statement explicitly conveying FERC's intention to displace state ROFR laws. In fact, FERC explicitly renounces its ability to preempt state law, as it "note[s] that nothing in this Final Rule is intended to limit, preempt [emphasis added], or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utilities, 136 FERC ¶ 61,051 (2011). Because ACES cannot point to any concrete statement conveying an intention to preempt state law beyond FERC's explicit renunciation of preemption, the district court correctly concluded that the NTPA does not offend the Supremacy Clause on these grounds.

### ii. FERC Order 1000 Does Not 'Actually' Conflict with Vandalia State Law

Through Order 1000, FERC only intended to "remove… any provisions that grant a federal [emphasis added] right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utilities, 136 FERC ¶ 61,051 (2011). Moreover, FERC intended Order 1000 to specifically "address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale [emphasis added] power markets and thereby ensure that Commission-jurisdictional transmission services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential." Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utilities, 136 FERC ¶ 61,051 (2011).

In keeping with the 'presumption against preemption' the court must read Order 1000 narrowly against the NTPA. Such a reading would make clear that FERC had little intention of preempting state law and had no desire to wade into retail energy market regulation. Order 1000's eliminated federal ROFR law, something that the NTPA does not attempt to reinstate. The NTPA exists to protect the state's domestic supply of cheap and efficiently provided energy. A narrow reading of Order 1000 yields no actual conflict of law.

### iii. Congress did not Intend for FERC to Exclusively Reign Over the Retail Energy Regulatory Environment

Where Congress intends to exclusively control a particular field of lawmaking, state law may be preempted. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). However, where states have typically created law and regulation, the courts must presume against preemption. The present case can be distinguished from Sante Fe, as before Order 1000, both the state and federal governments could issue ROFR laws. States have historically regulated the construction of electrical transmission infrastructure within their own borders and Congress has made no attempt to monopolize the regulatory field. The district court correctly found no Congressional intent to preclude states from regulating transmission line construction and permitting within their own borders.

Dormant Commerce Clause litigation often turns on the level of scrutiny applied by the courts on the facts. When weighing which level of scrutiny to examine the present case, the court must first consider whether the state law at issue 'discriminates facially' against interstate commerce. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir.1996). Such discrimination cannot include "enact[ing] laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm v. Heald*, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). Unless the state can show the discrimination is justified by a non-protectionist aim, the law is invalid. *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009).

If the law does not 'discriminate facially', courts may then apply the Pike balancing test. The Pike test simply asks the court to weigh whether the cost to interstate commerce is outweighed by the benefit to local interests. *McBurney v. Young,* 667 F.3d 454, 468 (4th Cir. 2012), aff'd, 569 U.S. 221, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013).

## III. A Dormant Commerce Clause Analysis is Unnecessary because Vandalia is a Market Participant

While the dormant Commerce Clause indeed prohibits unjustifiable restrictions on interstate commerce, it is long established that "nothing in the purposes animating the Commerce Clause prohibits a State… [from] participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 810, 96 S.Ct. 2488, 2498, 49 L.Ed.2d 220. Pp. 2276–2277. The NTPA is Vandalia's attempt to enter into the retail electricity market, and expands beyond mere regulation. The combination of Vandalia's capacity order and its ROFR law effectively form a public-private partnership to provide the citizens of the state with an inexpensive and reliable form of power.

The present case is comparable to *White v. Massachusetts Council of Cosnt. Employers*, where the court characterized a Boston executive order requiring all city funded projects to be completed by teams of workers consisting of at least half city residents to be consistent with the Dormant Commerce Clause. See *also White v. Massachusetts Council of Constr. Employers, Inc*., 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983). Vandalia is essentially creating a public-private partnership with retail electricity companies operating within the state and is a market player, just as the United States Department of Defense that contracts with defense corporations is a market player in the global defense industry. (going to add Reeves citation)

**A. The NTPA does not Discriminate Facially Against Interstate Commerce because the Original Complaint is Limited to Business Requirements and not the Flow of Commerce and the Rule in Tracy Should Control**

The Dormant Commerce Clause does not protect the participants in the market, it merely protects interstate commerce itself. The Fourth Circuit correctly noted an important distinction in Dormant Commerce Clause analysis, holding that "The dormant Commerce Clause is implicated by burdens placed on the flow of interstate commerce… [it does not] protect the participants in intrastate or interstate markets, nor the participants' chosen way of doing business. *Brown v. Hovatter,* 561 F.3d 357, 364 (4th Cir. 2009). Consequentially, ACES complaints are merely contained to disputes over what the State of Vandalia requires in order for non-incumbent utilities to enter into the state market. The NTPA does not bar non-incumbent utilities from building transmission lines in the state; ACES could have purchased an incumbent utility, could have waited the 18 month period, and could have partnered with an incumbent utility to jointly construct a transmission line. ACES is not entitled to conduct its business in any way it seeks, it must demonstrate that Vandalia's rules are more than mere inconveniences or speed bumps to constructing transmission lines in the state.

Even in the unlikely scenario ACES could convince this court that the NTPA discriminates facially against interstate commerce, the state can point to a compelling and non-protectionist local interest. ROFR, when taken in the context of Vandalia's larger energy scheme, including the capacity factor order, points to the state interest in providing efficient and inexpensive energy. If Vandalia allowed non-incumbent utilities to build transmission lines unincumbered and without regard to retail market planning, then many of the most efficient transmission line routes could be swallowed by larger wholesale market utilities. Finding free land, or seizing it through eminent domain, is expensive and arduous and ACES is already attempting to build and control transmission lines along some of these possible routes. The state's interest is preserving the best transmission line routes for its incumbent retail utilities to ensure residents have reliable and cheap energy, whereas ACES is a wholesale provider merely seeking to traverse the state. Vandalia has and ought to have the ability to protect its retail energy market from wholesale providers seeking to gobble up ideal transmission routes. There is no less discriminatory means of protecting this interest. ACES does not intend to provide power to the people of Vandalia, rather, it simply seeks to cherry-pick profitable projects when it sees fit. Providing a cheap and efficient supply of energy effects cost of living, quality of life, basic healthcare, and other fundamental elements of the human condition to such an extent as to justify a facially discriminatory practice.

### B: General Motors v. Tracy should control the present case because it closely resembles the facts.

Tracy held that the Dormant Commerce Clause only regulates discrimination between two "similarly situated" entities. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). As described in Tracy, the State of Ohio provided in-state providers of natural gas a tax break. A similar dynamic exists within the natural gas industry; in-state providers are more responsive and fulfill the vast majority of retail demand, whereas larger interstate traders operate more within the wholesale market between independent producers and distributors. *Id.* at 811, 813. Critically, the court found that "difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299, 117 S. Ct. 811, 824, 136 L. Ed. 2d 761 (1997). Tracy's shadow looms over the present case, the incumbent utilities in Vandalia overwhelmingly service the retail market, whereas ACES is a player in the broader regional wholesale market. The incumbent providers are subject to other regulations that ACES is not, and ACES is seeking to compete with the retail providers only within the field of transmission line construction. Thus, ACES is not 'similarly situated' to the incumbent retail providers.

### C. Under the *Pike* Balancing Test the NTPA Survives Scrutiny because its Benefits to Consumers Vastly Outweigh Costs to Interstate Commerce

The Pike test is a simple mechanism widely accepted by the courts to evaluate the constitutionality of state regulations impacting interstate commerce; insofar as the state is regulating in order to promote a "legitimate local interest… and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970).

The present case is comparable to *United Haulers Association*, where the Supreme Court held that county control ordinances that effectively favored in-state waste hauling companies survive the *Pike* test because the law promoted recycling. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.,* 550 U.S. 330, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007). While Vandalia's ROFR may put a damper on interstate commerce, the local benefits of the law clearly outweigh the costs to interstate commerce. Incumbent utilities are more responsive to local concerns. Moreover, preserving ideal transmission line routes for local retail market providers, rather than allowing large wholesale providers to swallow the lines up, promotes efficient energy distribution within the state. Efficient and inexpensive electricity transportation is essential to the quality of life of Vandalia's citizens.

There is little evidence that Vandalia's ROFR would even increase costs to interstate commerce. In ACES' ideal world, the ROFR would be struck down and ACES could instantly construct transmission lines. In the status quo, ACES cannot instantly construct the lines; either an incumbent utility will or ACES can after 18 months. In either world, with or without the ROFR, the lines ACES needs to transport electricity through interstate commerce will be built and the electricity will traverse through interstate commerce.

### D. The Present Case Better Resembles LSP Transmission than NextEra because the Minnesota Statute is Nearly Identical to The NTPA

ACES attempts to analogize the present case to the Texas ROFR statute at issue in NextEra, but there are critical differences. The Texas statute provides for no time limit on the enforceability of the ROFR, whereas Vandalia's statute provides for 18 months. The Texas statute does not provide any mechanism for a non-incumbent provider to acquire an incumbent provider and circumvent the ROFR unlike Vandalia's statute. Most extremely, the Texas statute is even more facially discriminatory than the Vandalia law. The Texas statute requires that transmission lines connecting facilities may only be built by the owner of the facility. TEX. UTIL. CODE § 37.056(e) (quoting from *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 314 (5th Cir. 2022)). Vandalia requires nothing nearly as restrictive. In evoking NextEra, it seems that ACES has mixed up its apples and oranges.The court should instead look to *LSP Transmission*, primarily because the underlying Minnesota statute is virtually identical to Vandalia's law. The Minnesota statute provides for a ROFR for federally approved projects, expiring after 18 months. Moreover, Minnesota defines its "incumbent electric transmission owners" in nearly an identical fashion to Vandalia's definition. Minn. Stat. Ann. § 216B.246 (West). Like in Vandalia, the Minnesota law applies equally to all transmission owners, regardless of whether the provider is based in the state or operates out of it. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020).

## CONCLUSION

The Twelfth Circuit must uphold the ruling of the district court in order to protect the fundamental characteristics of our federal republic. States ought to and do have the prerogative to promulgate laws and regulations to protect access to efficient and cheap electricity and major job creating industries. The law resoundingly supports the district court's accurate conclusions that first and foremost, ACES does not have standing; the CFO is not preempted by the Federal Power Act because this is not a field that Congress intended to have exclusive domain over and nor does the CFO conflict with any federal law; the state preserves the right to protect incumbent ROFR without violating the dormant Commerce Clause as the Eight Circuit has held, and that neither regulation violates the Supremacy Clause.

## CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 18