UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

ORDER

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC., Appellant, v. CHAIRMAN WILL WILLIAMSON, *in his official capacity*, COMMISSIONER LONNIE LOGAN *in his official capacity,* and COMMISSIONER EVELYN ELKINS, *in her official capacity,* Appellees.	)))))))))))))))	C.A. No. 22-0682

On Appeal from the United States District Court

For the Northern District of Vandalia

BRIEF FOR APPELLANT

Team No. 33

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants filed this action in the United States District Court for the Northern District of Vandalia to enjoin the Defendant State officials from enforcing the Capacity Factor Order and *VAND. CODE* § 24-12.2(d) ("Native Transmission Protection Act") for constitutional violations. Plaintiffs brought claims under 42 U.S.C. § 1983 and the United States Constitution asserting violations of the Commerce Clause (U.S. CONST., art. I, § 8) and Supremacy Clause (U.S. CONST., art. VI, cl. 2). The District Court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. On August 15, 2022, the District Court granted Defendant's motion to dismiss and entered its final judgment that day. Appellants timely filed this appeal on August 29, 2022. Fed. R. App. P. 4(a)(1). This Court has jurisdiction under 28 U.S.C. § 1291, as this is an appeal from a final judgment of a United States District Court.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES has standing to challenge a state law when it interferes with market signals and enables the illegal entrance of market competitors into wholesale auctions.

II. Whether the Vandalia Public Service Commission's Capacity Factor Order directly conflicts with FERC's authority under the Federal Power Act when it effectively sets wholesale rates.

III. Whether FERC Order 1000 preempts the NTPA when the NTPA reaches beyond traditional state powers and interferes with approved regional transmission plans.

IV. Whether Vandalia violated the dormant Commerce Clause when it enacted the NTPA and granted in-state transmission owners a ROFR on regional transmission projects.

STATEMENT OF THE CASE

A. Appalachian Clean Energy Services, Inc.

Appellant, Appalachian Clean Energy Services, Inc. (ACES), is an energy company involved in electric generation and interstate transmission. R. at 4. ACES generates exclusively for resale in the wholesale markets. *Id.* The company maintains its headquarters and incorporation in Springfield, Vandalia. *Id.* As the largest independent electricity transmission company in the country, ACES serves a combined peak load above 26 GWs along 16,000 circuit miles of transmission lines. *Id.* at 5.

ACES plans to retire its coal-fired power plant in Ohio and construct a clean, carbon-capturing gas plant in Pennsylvania to decarbonize. *Id.* ACES also plans to construct a high-capacity transmission line extending from Rogersville, PA to Raleigh, NC. *Id.* The line, dubbed the "Mountaineer Express," will decrease congestion and increase reliability in the PJM grid, which also helps utilities across the country make the switch to cleaner generation. In March 2022, PJM approved the Mountaineer Express for inclusion in the Regional Transmission Expansion Plan. *Id.* at 6. A series of actions by Vandalia officials have halted ACES's plans.

B. Vandalia's Public Service Commission and Utilities

Appellees, the Vandalia Public Service Commission (VPSC), regulate Vandalia's utilities and rates. *Id.* at 6. The VPSC faces a statutory obligation to prop up coal generation in the state. *VAND. CODE § 24-1-1D(5).* Coal accounted for 91% of Vandalia's total electricity net generation in 2021. R. at 8. Two retail utilities, LastEnergy and Mid-Atlantic Power Co. (MAPCo), serve Vandalia. *Id*. at 4. LastEnergy operates two coal-fired plants and MAPCo operates three coal-fired plants. *Id*. The utilities export half their generation to other states and exclusively sell into the PJM wholesale market under their Fixed Resource Requirement (FRR) status. *Id.* at 8. n.7.

C. FERC's Exclusive Authority and FERC Order 1000

Under the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has sole authority over wholesale sales of electricity. *Id.* at 13. Regional Transmission Organizations, like PJM, help FERC set rates by conducting auctions. *Id.* at 3. Generators bid into PJM auctions at their generation price. *Id.* Starting with the lowest bids and working up, PJM purchases enough energy or capacity to meet demand. *Id.* A generator that PJM purchases from has "cleared" the market successfully while the remaining bidders that PJM did not purchase from receive no business. Each successful bidder receives the price at which the last successful bidder entered the market. *Id.* For example, if 12 of 30 bidders cleared the market, and the most expensive bidder to clear entered a bid of $60/MWh, all 12 successful bidders receive $60/MWh. The other 18 receive nothing. FERC designed the auctions to efficiently allocate supply and demand, to ensure utilities receive just and reasonable payment, and to mimic the price an efficient market would produce. *Id.* at 13.

In 2011, FERC issued Order 1000 to address inefficiencies in transmission planning and cost allocation. *Id.* at 14. The Order eliminated federal rights of first refusal (ROFRs) from transmission utility open access tariffs. *Id.* FERC issued the Order because ROFRs caused unjust and unreasonable rates and promoted inefficient transmission planning. *Id.* FERC recognized that States maintain their traditional authority over siting and permitting transmission lines. *Id.*

D. The Capacity Factor Order and the Native Transmission Protection Act

On May 15, 2022, the VPSC issued the Capacity Factor Order (CFO) requiring Vandalia's coal generators to maintain 75 percent capacity factors. *Id*. at 8. The CFO included a finding of fact purporting that Vandalia's generators could economically maintain a 75 percent capacity factor. *Id.* A citizen action group, however, disputed this finding with evidence showing that the generators could economically operate with capacity factors of 40-60 percent. *Id*. at 9. The CFO also includes a cost-recovery guarantee, which ensures Vandalia's coal generators can compete on the interstate market. *Id.* PJM ratepayers pay for Vandalia's coal generation, despite uneconomical bids into PJM's auction, due to the FRR. *Id.* n.7.

In 2014, Vandalia's legislature passed the Native Transmission Protection Act (NTPA) in direct response to FERC Order 1000. *Id.* at 9. The NTPA grants incumbent transmission owners in Vandalia the exclusive right to "construct, own, and maintain" transmission lines "in a federally registered planning authority transmission plan" for 18 months. *Id*. After 18 months, a third party may construct the line. *Id.* Vandalia's two incumbent utilities, LastEnergy and MAPCo, expressed support for the NTPA's protection of "in-state" companies and restoration of the "status quo" before FERC Order 1000. *Id.*

E. Procedural History

ACES appeals from the lower court decision to dismiss all four claims against the VPSC. The lower court held that ACES lacked standing, that the CFO did not violate the Supremacy Clause, that the NTPA did not violate the Supremacy Clause, and that the NTPA did not violate the Dormant Commerce Clause. *Id.* at 15-16. ACES timely filed this appeal. ACES seeks to enjoin the VPSC from enforcing both the CFO and NTPA.

SUMMARY OF THE ARGUMENT

This is a case about deceptive state actions that undermine federal authority all to protect a dying industry. ACES's claims must proceed past the pleadings stage and this court should issue an injunction on the CFO and NTPA. As a threshold matter, ACES sufficiently alleges standing. ACES, along with all competitors in PJM auctions, suffers an economic harm because Vandalia's CFO distorts price signals. This distortion undermines FERC rates and allows

Vandalia's coal generators to illegally enter a market they otherwise could not compete in. ACES's alleges timely harm that this court can redress by enjoining Vandalia's enforcement of the CFO.

This court should affirm *Hughes v. Talen Energy Mktg.*, by holding that the FERC's authority under the FPA preempts the CFO. The CFO creates artificially low bids that distort clearing prices and push FERC's rates outside the just and reasonable range. Unjust and unreasonable rates do not create an efficient market thereby hindering the development of new or clean generation. Additionally, the inapposite ZEC cases find no purchase here because the VPSC tethers the CFO to the wholesale market.

FERC Order 1000 preempts Vandalia's Native Transmission Protection Act because the NTPA frustrates FERC's transmission planning objectives. The VPSC adopted the NTPA to reverse an unwanted FERC order. State and utility representatives alike expressed support for the NTPA and its return to the status quo before FERC issued Order 1000. The NTPA expressly undermines FERC's objectives by increasing regional planning inefficiencies and rates for PJM ratepayers. If the court allows Vandalia to reach so far beyond the traditional police powers of the state to interfere with interstate transmission planning, FERC can no longer serve its obligations under the FPA. Vandalia's reading of FERC Order 1000 creates an absurdity, and their encroachment onto federal turf cannot stand.

This court should strike down the NTPA because it violates the dormant Commerce Clause (DCC). For DCC analysis, meaningful in-state presence controls, not place of incorporation. The NTPA is virtually *per se* invalid because it discriminates against interstate commerce on its face, in its effects, and in its purpose.

The NTPA discriminates facially by distinguishing between out-of-state entities and in-state entities giving the latter preferential treatment. The name and legislative history show that the VPSC enacted the NTPA with an economic protectionist purpose in mind, and Vandalia knew of its discriminatory effect. The NTPA unconstitutionally requires in-state presence to protect incumbent utilities from competition by granting them a ROFR. Vandalia creates economic barriers that burden out-of-state entities to give local businesses a competitive advantage. Vandalia cannot justify the NTPA's burden on interstate competition by arguing that it promotes the state's struggling coal industry.

Even if the NTPA was an even-handed statute, it would fail the *Pike* test because it unconstitutionally burdens interstate commerce. Vandalia has not pointed to any legitimate local interest to justify its burdens on interstate transmission. The NTPA burdens not only ACES but all of PJM. The NTPA delays and increases the costs of ACES's federally-approved Mountaineer Express and the Rogersville project and increases consumer rates.

This court should move ACES's complaints past the pleading stage and enjoin Vandalia's enforcement of both the CFO and NTPA.

STANDARD OF REVIEW

The standard of review for a motion to dismiss heavily favors the nonmoving party. The reviewing court must accept all material allegations of the complaint as true and must construe the complaint in favor of the complaining party. *Warth v. Sedin*, 422 U.S. 490, 501 (1975). The court must also draw all reasonable inferences in the plaintiff-appellant's favor. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018).

ARGUMENT

I. ACES HAS STANDING TO CHALLENGE THE INJURIOUS CAPACITY FACTOR ORDER BECAUSE IT UNDERMINES EFFICIENT MARKET SIGNALS AND WHOLESALE COMPETITION.

ACES has standing to challenge the CFO. Article 3, section 2 of the Constitution requires a plaintiff to make out a case or controversy between themselves and the defendant. *Warth*, 422 U.S. at 498 (1975). The standing requirement restrains judicial review by ensuring each party can competently and fully argue their side enough to justify adjudication. *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). The courts have established three elements for standing: first, a plaintiff must have suffered an injury-in-fact; second, the injury must trace back fairly to the defendant; and third, a favorable court ruling must redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-1 (1992). ACES meets this "irreducible constitutional minimum." *Id.*

a. <u>ACES suffers an injury because it cannot compete with state-subsidized generators on the wholesale market, stripping the $3.1 billion Rogersville investment of meaningful value.</u>

ACES will suffer a particularized, imminent, and palpable economic injury if the CFO continues unabated. The injury-in-fact element of standing contains three separate considerations. The injury must be particularized and concrete, actual or imminent, and not hypothetical. *Id.* at 560. ACES meets each of these requirements. First, the CFO undermines FERC's wholesale price signals by subsidizing coal generators and harming competition in wholesale auctions. Second, the CFO economically injures ACES, its Rogersville project, and its ability to compete in wholesale markets. Third, the CFO's effects are palpable, not abstract or concrete. ACES will face economic injury because of the CFO.

i. ACES suffers a particularized and concrete economic injury because of Vandalia's wholesale market interference.

ACES has alleged a concrete and particularized injury. The Court has long characterized a "particularized injury" as one that affects the plaintiff in a personal and individual way. *Id.* at 560 n.1. Courts review only concrete injuries to avoid affording overly broad relief. *Warth*, 422 U.S. at 508. A complaining party must be among the injured but need not be the only injured party. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016) (explaining that a party does not lack standing merely because other people suffer the same injury). A concrete and particularized injury personally impacts the plaintiff, and the plaintiff can establish the injury with specific facts.

ACES suffers economic harm because the CFO stifles ACES's ability to compete in wholesale markets. FERC sets wholesale rates using auctions because the auction clearing price represents the price a competitive (efficient) market would produce. *FERC v. Electric Power Supply Ass'n*, (*EPSA*) 577 U.S. 260, 268 (2016). By requiring 75 percent capacity factors and guaranteeing cost recovery, the CFO operates as a state subsidy that distorts price signals in favor of Vandalia coal generators.[1] Vandalia's coal generators can bid into auctions at lower, uneconomical rates and Vandalia will pay the difference. PJM's clearing price will fall because of the artificially low bids. Lower clearing prices create hardship for new projects. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 156 (2016) ("[A] low clearing price discourages new entry."). ACES and the Rogersville project will suffer economic harm because of Vandalia's illegal price distortion.

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[1] Vandalia's coal generator's *must* enter the competitive markets under their Fixed Resource Requirements (FRR). R. at 8 n.7 (emphasis added).

Even if this court disagrees that market interference satisfies injury-in-fact, ACES still has standing to challenge an illegal market entrant. A party challenging such a state action alleges a sufficient injury-in-fact. *See Ass'n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (identifying competition from an illegal market entrant as an injury); *See also Leaf Tobacco Exporters Ass'n, Inc. v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984) (holding that the plaintiffs alleged an injury in complaining about an illegal governmental act that allowed a competitor to enter their market).

The CFO allows LastEnergy and MAPCo to illegally enter an energy market they historically could not clear. R. at 7. Without the CFO, Vandalia's coal utilities cannot clear the market because interstate competition generates lower-cost energy. *Id*. With the CFO, Vandalia's utilities can bid any price that can clear with guaranteed cost recovery. ACES and all PJM utilities will suffer economic harm from the illegal entrance of Vandalia's coal generators and VPSC's price signal distortion. Even though the harm impacts all utilities competing in PJM's auctions, ACES still alleges a concrete and particularized injury.

ii. The CFO undermines market competition, harming generators in all PJM-serviced States.

The CFO injures ACES because it distorts market signals and allows Vandalia's utilities to illegally enter PJM auctions. An injury must actually occur or "be certainly impending" to gain standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Allegations of possible future injuries will not suffice. *Id.* But, a party need not wait for an impending injury to occur before obtaining relief; an impending injury affords standing. *Pac. Gas and Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 201-2 (1983) (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 *aff'd* 263 U.S. 350 (1923)).

The CFO allows Vandalia's coal generators to enter the PJM auction at uncompetitive prices. The CFO has and will continue to cause a loss of revenue by artificially suppressing PJM auction prices. It also allows LastEnergy and MAPCo to illegally enter the market. The existence of economic injury and illegal market entrants suffices to allege an actual and impending injury.

iii. The CFO has a distinct and palpable effect on ACES, rising above a mere hypothetical or conjectural injury.

ACES will suffer a distinct and palpable injury. The courts will not address a conjectural or hypothetical injury for fear of overstepping and breaching the legislature's duty to create policy. Courts adjudicate distinct and concrete controversies only. *Clapper*, 568 U.S. at 408. A plaintiff must allege a distinct and palpable injury, not an abstract one. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

ACES will suffer palpable economic harm from illegal competition. ACES has invested $3.1 billion into the Rogersville project. R. at 5. The undermining of a $3.1 billion asset, far from being abstract, is a concrete threat, and the CFO will rob ACES's investment of its return potential. Additionally, ACES has earned FERC approval for a $1.7 billion transmission line to complement the Rogersville project. *Id.* at 6. The CFO's distortion of price signals distinctly harms ACES because its investments cannot compete with subsidized generators. *Cf. LSP Transmission Holdings, LLC. v. FERC*, 700 F. App'x. 1, 2 (D.C. Cir.) (2017) (finding a lack of standing because the challengers "have no active bids."). ACES states a claim based on a distinct and palpable economic injury to its active bids and projects. ACES's claim lies not in hypothetical worries, but in real concerns of market interference.

b. The CFO causes ACES's injury.

This court can fairly trace the CFO back to the VPSC. For standing, the plaintiff's injury must be fairly traceable to the defendant, not some independent third party. *Lujan*, 504 U.S. at 560. While defendants here do not contest the traceable element of standing, ACES can still establish the element. The Commissioners issued the CFO. But for the Commissioner's order, ACES would not face the threat of economic harm. *See NextEra Energy Cap. Holdings, Inc. v. Walker*, 2020 WL 3580149, 4 n.3 (W.D. Tex. Feb. 26, 2020) ("the individual Commissioners of the PUCT are the proper parties in this case."). Unlike *Zibelman*, the court can trace ACES's injury back to the CFO because the CFO itself illegally interferes with market signals and violates the FPA.[2] ACES can trace its injury back to the VPSC.

c. Invalidating the CFO will restore market efficiency as determined by FERC, and remedy ACES's injury.

A favorable ruling by this court will redress ACES's injury. To establish the final standing element, a plaintiff must show that a favorable court ruling will redress their injury. *Lujan*, 504 U.S. at 561. This requirement, too, ensures the likelihood of an injury so the court does not adjudicate speculative harms. *Id.* Invalidating the CFO as preempted under the FPA will: redress ACES's injury; return wholesale prices to the efficient point FERC's ratemaking process generates; and allow ACES to recover the costs of their investment because their Rogersville facility will not face subsidized competition in wholesale markets. Even if this court ultimately disagrees with ACES's substantive arguments, ACES has sufficiently established a controversy and standing to challenge the CFO and should move past the pleadings phase.

[2] In *Zibelman*, the ZEC program would interfere whether discrimination occurred or not, but the program itself was legal. *Zibelman*, 906 F.3d at 58. This meant that the court could not trace the injury back to the PSC because the PSC did not issue an illegal order; they merely chose among fuel types to encourage.

II. THE VANDALIA PUBLIC SERVICE COMMISSION INTRUDES ON FERC'S EXCLUSIVE AUTHORITY BECAUSE THE CAPACITY FACTOR ORDER EFFECTIVELY SETS WHOLESALE RATES.

The VPSC's CFO directly conflicts with FERC's authority under the FPA and ACES's claim should proceed past the pleadings stage. The CFO disregards the division of authority between state and federal regulators by setting an interstate wholesale rate. Like *Hughes v. Talen Energy Mktg.*, the CFO distorts auction clearing prices undermining FERC-set just and reasonable rates; unlike the ZEC cases, the VPSC tethers the CFO to the wholesale market.

Article VI, clause 2 of the U.S. Constitution (the Supremacy Clause) establishes that the U.S. Constitution and laws "shall be the Supreme law of the land." U.S. CONST., art. VI, cl. 2. The Supremacy Clause permits Congress to preempt state law. Federal laws preempt state laws where: Congress comprehensively legislates to occupy an entire field of regulation leaving no room for the states, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989); a state law hinders the objectives of Congress, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); or the conflict makes it impossible to comply with both federal and state laws. *Arizona v. United States*, 567 U.S. 387, 399 (2012). A federal agency may preempt state law if it is acting within the scope of congressionally delegated authority. *New York v. FERC*, 535 U.S. 1, 2-3 (2002).

The FPA's and FERC's authorities are regularly called into question regarding the state regulation of electricity because the "wholesale and retail markets in electricity are inextricably linked." *EPSA*, 577 U.S. at 265. The FPA expressly grants FERC the exclusive power to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). FERC's authority to regulate wholesale sales extends to:

> all 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 the Commission, and all rules and regulations affecting or pertaining to such

> rates or charges shall be *just and reasonable*, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Id. § 824d (emphasis added). FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* § 824(b)(1).

The FPA leaves states the authority to regulate "any other sale" including any retail sale of electricity, and "facilities used for the generation of electric energy." *Id*. § 824(b), (b)(1); *EPSA*, *577* U.S. at 265. States may not directly intrude on FERC's authority to set wholesale rates or indirectly regulate to achieve the same result. *Hughes*, 578 U.S. at 151 (citing *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)). Compelling a wholesale transaction involves the regulation of wholesale sales and falls within the field that Congress has occupied via the FPA. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017). R.14.

A State can encourage the production of new or clean generation through measures "untethered to a generator's wholesale market participation" so long as the State does not "condition payment of funds on capacity clearing the auction." *Hughes*, 578 U.S. at 166. In *Hughes*, Maryland tried to encourage the development of new in-state generation. *Id.* at 151. Maryland selected CPV Maryland, LLC. (CPV) to construct a new power plant and required load-serving entities to enter a 20-year pricing contract with CPV at a CPV-specified rate. *Id*. CPV continued to sell its capacity through the PJM auction, but it received the contract price rather than PJM's clearing price. *Id*. The Court held that Maryland's program was preempted because it disregarded an interstate wholesale rate required by FERC. *Id*. at 166.

States may work with FPA's dual regulatory system to create programs in line with federal goals such as facilitating wholesale market efficiency and increasing the supply of electricity to lower auction clearing prices. *Zibelman*, 906 F.3d at 57. In *Zibelman,* the New York PSC adopted a Zero Emissions Credit (ZEC) program to reduce green-house gas emissions. *Id.* at 45. The program subsidizes qualifying nuclear power plants through state-created and -issued credits certifying the zero-emissions *attributes* of electricity produced from the nuclear plants. *Id*. The Second Circuit held that the ZEC program was not field preempted because the plaintiffs did not identify an impermissible tether between the ZEC program and wholesale market participation. *Id.* at 57. The program was not conflict preempted either because the ZEC program did not cause clear damage to federal goals; at most the program had an incidental effect on the wholesale market. *Id*.

Here, the CFO intrudes on FERC's exclusive authority in three ways: it distorts FERC's price signals, undermines FERC's obligations to set just and reasonable rates, and disrupts the development of new or clean generation. First, the CFO distorts price signals by subsidizing coal generation that otherwise could not compete in interstate auctions. The CFO requires coal plants to run 75 percent of the time, despite available lower-cost power supplies from PJM. R. at 1. The CFO then guarantees cost recovery for those coal generators if their bids cannot compete in wholesale auctions. *Id.* at 8. This cost-recovery guarantee allows Vandalia's coal generators to enter the market at artificially low prices, and earn a rate distinct from FERC's rate, like in *Hughes*. *Hughes*, 578 U.S. at 151. The artificially low bids disrupt the typical clearing price and prevent competing interstate utilities from clearing the market. The CFO succumbs to the same fatal flaw as Maryland. *See Elec. Power Supply Ass'n v. Star*, 904 F. 3d at 523 (7th Cir. 2018) (holding that conditioning payment of funds on capacity clearing the interstate auction violates the FPA).

Second, Vandalia disregards FERC's obligation to set just and reasonable wholesale rates. The CFO's cost-recovery guarantee undermines FERC's obligation because it shifts the entire wholesale auction down. FERC uses wholesale auctions to mimic the price an efficient market would produce and ensure competitors earn just compensation. *EPSA*, 577 U.S. at 268; R. at 14. The CFO's subsidized rate does not mimic an efficient market and prevents interstate competitors from earning just compensation. While the VPSC made a finding of fact supporting the economics of a 75 percent capacity factor, the citizens action group dismissed that finding by showing that coal plants can operate economically 40-60 percent of the time. R. at 9. The CFO pushes FERC's rates outside the just and reasonable range.

Third, the CFO distorts price signals in the PJM market, making it difficult to build new capacity in the region. R. at 12. FERC's markets are "designed to efficiently allocate supply and demand, a function which has the collateral benefit of incentivizing the construction of new power plants when necessary." *Id.* at 3. But low clearing prices can discourage utilities to build out new generation. *Hughes,* 578 U.S. at 156. The CFO discourages new supply and encourages old and dirty generation—contrary to the State powers recognized in *Hughes*. *See Id.* at 166 (recognizing that States can permissibly use tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector to encourage the development of *new or clean* generation) (emphasis added). Vandalia, with an energy mix of 91 percent coal, shows no effort to develop *new or clean* generation. All of the VPSC's directives are coal-based: the VPSC wants to reverse the trend away from coal-fired plant closures and maximize the output of coal-fired plants. *VAND. CODE § 24-1-1(a)(3); id. § 24-1-1D(5); id. § 24-1-1D(12)*. The VPSC issued the CFO as a direct result of the low-capacity factors for the coal plants owned and operated by each utility. R. at 7. This court should give no weight to the VPSC's desire to save in-state generation at the expense of *new or clean* additional capacity.

The VPSC incorrectly argues that the ZEC line of cases control, rather than *Hughes*. The ZEC cases do not apply to the CFO for two reasons: the ZEC programs subsidize zero-emissions *attributes* of nuclear, and ZECs are not tethered to the wholesale market. First, the ZEC programs regulate the zero-emissions *attributes* of energy generation, not energy generation itself. *Zibelman*, 906 F.3d at 51-52. States use ZECs to compensate nuclear generators for producing energy without emissions, not for the actual energy they produce. Therefore, states issue ZECs completely untethered from wholesale rates and participation in wholesale auctions. *Id.* at 54. Unlike coal plants, a nuclear plant cannot vary its output depending on price; it must sell its entire output at the market clearing price—which could fall below the cost of production—making it less economical to produce energy without ZECs. *Id.* at 47. Thus, ZECs create an incentive to move toward renewable, clean energy untethered to wholesale auctions—not a Hail Mary to save in-state generators.[3]

Second, unlike the ZEC cases, the CFO is tethered to the wholesale market due to the utilities' FRR status with PJM. All of Vandalia's coal-fired plants are required to sell into PJM's wholesale market. The tether exists because the utilities must make up the difference between the state's rate and the FERC-approved market rates. The CFO's cost guarantee varies inversely with the FERC-approved rate and favors producers "in connection with," 16 U.S.C. § 824d(a),

[3] Recall, in *Hughes*, the Court held that States may encourage *new or clean* development. The ZEC program fits into the recognized State actions in *Hughes* while the CFO does not. The ZEC program compensates the zero-emissions attributes of the electricity production; the VPSC subsidizes coal generation.

wholesale sales. *Zibelman*, 906 F.3d at 51. Contrastingly, the ZEC rate varies with the amount of new renewable energy generated in the States, not the clearing price. *Id*.

The VPSC argues that LastEnergy's and MAPCo's FRR creates the tether, not the CFO. This argument is oxymoronic. All coal-fired power plants in Vandalia must exclusively sell into PJM pursuant to their FRR status. R. at 8 n.7. Under Schedule 8.1 of the Reliability Assurance Agreement between the utilities and PJM, the utilities must obtain sufficient capacity for all load and expected load growth in their FRR service area. *Id*. The CFO depends on LastEnergy's and MAPCo's selling into the PJM, otherwise their capacity factors would be zero. The VPSC's technicality argument finds no purchase; it represents a veiled attempt to skirt the *Hughes* precedent and substitute the inapposite ZEC cases.

The FERC's actions under the FPA preempt the CFO pursuant to *Hughes*. The CFO infringes on FERC's authority to set just and reasonable rates and alters clearing prices, hindering the development of new or clean generation. Unlike the ZEC cases, the CFO is tethered to the wholesale market by subsidizing generation rather than its attributes. ACES's claim should proceed past the pleadings stage.

III. FERC ORDER 1000 PREEMPTS THE NTPA BECAUSE THE NTPA FRUSTRATES FEDERAL TRANSMISSION PLANNING AND CONSTRUCTION OBJECTIVES.

The NTPA conflicts with FERC Order 1000 and ACES's preemption claim should proceed past the pleading stage. Under the FPA, FERC regulates wholesale sales of electricity and actions incidental to wholesale sales. 16 U.S.C. § 824(b)(1). The FPA often preempts state actions that conflict with FERC's decisions or objectives. The NTPA frustrates the objectives of FERC Order 1000, reaches beyond traditional police powers, and undermines FERC's set rates under the competitive solicitation process.

Federal law preempts a state action if: complying with both the state and federal law is impossible, or a state law stands as an obstacle to federal objectives. *Arizona v. United States*, 567 U.S. at 399. Like FERC Order 1000 itself, courts presume that federal acts do not preempt traditional state police powers. *Id.* at 400. Despite this presumption, federal law will preempt state law to the extent that the state law reaches beyond traditional state powers to frustrate federal objectives. *See Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 (1984) (declining to extend the presumption beyond the point at which federal goals conflict with state goals). Federal agency decisions have the same preemptive effect as federal statutes if those decisions fall within the scope of the agency's delegated power. *Fid. Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

FERC issued Order 1000 to address the inefficiencies that came with rights of first refusal for constructing transmission lines. Incumbent utilities derive no benefit from allowing new competitors to construct transmission facilities. Transmission Planning & Cost Allocation by Transmission Owning and Operating Pub. Utils., 136 FERC ¶ 61051, ¶ 256 (2011) (Order 1000). Even if a new competitor could construct a facility more cost-effectively, incumbents have no incentive to forgo their ROFRs. Worried that ROFRs caused unjust and unreasonable rates, FERC prohibited federal ROFRs. FERC's other objectives included increasing efficiency in transmission planning and cost allocation while minimizing discrimination against transmission providers. *Id.* ¶ 1. FERC recognized the traditional police powers of the state in transmission siting and permitting, but this recognition does not authorize states to reach beyond the scope of their traditional powers. *Cap. Cities Cable*, 467 U.S. at 705.

By enacting the NTPA, Vandalia frustrates FERC's objectives in Order 1000, surpasses the scope of Vandalia's historic police powers, and undermines FERC's set rates via competitive solicitation. First, the NTPA conflicts with FERC objectives. PJM approved the Mountaineer Express for inclusion in the Regional Transmission Expansion Plan (RTEP) because of its stellar efficiency. R. at 10. Vandalia holds this federally-approved and cost-effective Mountaineer line hostage under the NTPA. By reinstating ROFRs, Vandalia also reinstates the inefficiency in PJM's transmission plan that FERC intended to eliminate. The NTPA threatens to halt all competitive bidding for 18 months and increase rates for PJM ratepayers because the cost-effective projects cannot proceed.

Additionally, state ROFRs that impact regional transmission plans conflict directly with Order 1000. Reading Order 1000 to allow these state ROFRs not only misreads the Order but creates an absurdity—that FERC would issue an order allowing States to violate and undermine its order. Reading the Order through this absurd lens conjures a similarly absurd image of the Court decision that says, "no lower courts must conform to this decision." FERC respects the state's traditional police powers, and the Order does not vitiate a state's decision to implement ROFRs on intrastate transmission plans. The Order does, however, wholly preempt state ROFRs that interfere with regional transmission plans.

Second, the NTPA reaches beyond the historic police powers of the State and treads on FERC's exclusive jurisdiction. The states' historic police powers have a terminus; they do not stretch into perpetuity. Federal jurisdiction cuts off a state's authority when state actions encroach onto federal turf. *See Cap. Cities Cable*, 467 U.S. at 704 (explaining that an Oklahoma restriction on distant broadcasts "plainly reaches beyond" the authority reserved to the states, and into federal territory). The NTPA specifically identifies ROFRs owned by incumbents in *federally* planned projects. *VAND. CODE § 24-12.3(d)*. MAPCo, one of two incumbent utilities in the state, publicly supported the law because it offers Vandalia utilities the first chance to invest in *federally* planned projects. *Id.* The NTPA clearly encroaches onto federal turf.

The NTPA, however, rises above typical state overreach: it represents a state's attack on an unwanted FERC decision. While introducing the NTPA, one Senator identified it as a "direct response" to FERC Order 1000. Another incumbent utility, LastEnergy, said the law resets the "status quo" before Order 1000 took effect and keeps transmission lines in the hands of "more responsive in-state companies." R. at 9. The law's extreme timeline (18 months, compared to Minnesota's 90 days, *NextEra*, 48 F.4th at 314) effectively hands incumbent utilities monopoly power over transmission projects, particularly federally approved projects. The NTPA takes FERC's respect for state police powers and blows it up into a complete contravention of federal authority and objectives.

Finally, the NTPA undermines FERC's set rates determined via the competitive solicitation process. PJM uses a competitive planning process to collect and approve the most cost-effective and innovative regional transmission projects. *Competitive Planning Process*, https://www.pjm.com/planning/competitive-planning-process (last visited Jan. 30, 2023). The competition creates price signals, like energy auctions. The NTPA undermines the entire competitive solicitation process by single-handedly disrupting PJM's regional plan and transmission cost signals. For example, ACES sited the Mountaineer line along pre-existing rights of way to minimize environmental harms and increase cost-effectiveness. R. at 10-11. The NTPA robs ACES of the use of their RTEP approval and forces ACES into inefficient and tedious private negotiations with landowners. As opposed to the sleek, cost-effective transmission lines PJM prefers under Order 1000, the NTPA causes economic hardship to ACES and ratepayers, increasing rates that FERC sets through its competitive solicitation process. The

NTPA conflicts with every core tenet of FERC's Order 1000. Even if this court disagrees, ACES's claim must proceed past the pleading stage.

IV. THE NTPA VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT PROTECTS VANDALIA'S INCUMBENT UTILITIES FROM OUTSIDE COMPETITION.

The NTPA insulates Vandalia's incumbent utilities from interstate transmission competition, violating the DCC. ACES's DCC violation claim should proceed past the pleadings phase. For DCC analyses, meaningful in-state presence of a firm controls, not the firm's place of incorporation. Under this framework, the NTPA violates the DCC because it purposefully and effectively insulates Vandalia's incumbent utilities from interstate transmission competition. However, even if the court disagrees with the discriminatory purpose and effect of NTPA, the law still fails the *Pike* test and violates the DCC.

a. <u>In Dormant Commerce Clause analysis, place of incorporation does not control when a state insulates its in-state industry from interstate transmission competition.</u>

Meaningful in-state presence controls in a DCC analysis, not place of incorporation. A law that discriminates based on a business's contacts with the local economy violates the DCC. *See Lewis v. BT Inv. Managers, Inc*., 447 U.S. 27, 42. (concluding that a Florida statute discriminated because only financial institutions "with principal operations *outside* Florida [we]re prohibited from operating within the State."). Most circuits have rejected the idea that a law can bypass DCC scrutiny if its favored interests are incorporated elsewhere. *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022). Most circuits also agree that a state law can discriminate against interstate commerce even if most incumbent firms are incorporated out of state. *Id.* If incorporation controls, a firm's local political strength may influence state legislation in favor of in-state business. *Id.* [4]

The Court has struck down in-state presence requirements numerous times. For example, in *Granholm v. Heald*, the Court held that a New York statute discriminated because it required out-of-state wineries to establish "a branch factory, office, or storeroom within the state." 544 U.S. 460, 475 (2005). The Court explained that in-state presence requirements "ru[n] contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.*

The NPTA suffers from the political manipulation the Court has expressed concerns over. One MAPCo representative said the bill gives Vandalia's utilities the *first* chance to invest in *federally* planned transmission projects. R. at 9. He then urged the Vandalia Senate Committee to not let third-parties build transmission in Vandalia. *Id*. Another representative, from LastEnergy, called his utility an "in-state" company and said it was important to keep transmission in the hands of "more responsive in-state companies." *Id.*

By requiring in-state residency to benefit from a ROFR, the NPTA discriminates based on an entity's connections with the local economy. In doing so, it creates a similar in-state presence requirement to compete against residents on equal terms that the Court has struck down numerous times. *Granholm*, 544 U.S. at 475. As the Court has said, "discrimination based on the

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[4] The Fifth Circuit concluded that local presence mattered more than place of incorporation, expressing concern over the political clout an industry has regardless of incorporation. *Id*. at 323. The Eleventh Circuit agreed. *See Fla. Transp. Servs. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012) (cautioning that place of incorporation makes DCC liability "turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies.").

extent of local operation is itself enough to establish the kind of local protectionism we have [cautioned against]" *Lewis*, 337 U.S. at 42.

b. <u>The NTPA discriminates on its face, in its purpose, and in its effect because it expressly mandates differential treatment benefitting in-state entities and burdening out-of-state entities.</u>

The NTPA violates the DCC because it favors in-state businesses over similarly situated out-of-state businesses. *Lewis*,447 U.S. at 36-37. The DCC prohibits laws that discriminate against interstate commerce either on their face, in their effects, or in their purpose, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest," C *& A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). The DCC "preserves a national market for goods and services" by "prevent[ing] the States from adopting protectionist measures." *Tennessee 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)). The NTPA is subject to virtually *per se* rule of invalidity because it discriminates against interstate commerce on its face, in its effect, and in its purpose. Moreover, it does not fall into the narrow class of cases in which a state must discriminate to achieve its local goals.

i. The NTPA facially discriminates against out-of-state utilities by distinguishing them from incumbents and insulating those incumbents from interstate competition.

On its face, the NTPA creates a presence requirement indistinguishable from the local presence requirements the Court has struck down under the DCC. *Tenn. Wine*, 139 S. Ct. at 2462; *Granholm*, 544 U.S. at 475; *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951). In-state presence requirements are virtually *per se* invalid. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. at 2457 (striking down an in-state residency requirement that "blatantly favors the State's residents"); *Granholm*, 544 U.S. at 454-75 (striking down a law granting in-state wineries access to the State's consumers on preferential terms.) "States may not enact laws that burden out-of-state [entities] simply to give a competitive advantage to in-state businesses." *Id.* at 472. Economic barriers protecting local industry from interstate competition violate the DCC even if the laws also exclude some in-state businesses. *Dean Milk Co.*, 340 U.S. at 356. Laws also violate the DCC even if they protect only a single favored incumbent. *See* C *& A Carbone, Inc.*, 511 U.S. at 392 (explaining the fact that the ordinance favored only a single local entity, "just makes the protectionist effect of the ordinance more acute.").

The NTPA unconstitutionally gives in-state entities preferential treatment by granting ROFRs. *See, e.g., Id*. at 391. (striking down a regulation that gave one processor monopoly over local waste-processing services); *Dean Milk Co.*, 340 U.S. at 356. (striking down a regulation requiring all milk to be processed at local facilities within a short distance from Madison). Vandalia defines incumbent transmission owners as public utilities that "own, operate, or maintain" transmission lines "in this state." *VAND. CODE § 24-12.2(f)*. The NTPA, then, grants those incumbents an effective 18-month monopoly on *federally* planned transmission lines through ROFRs. *VAND. CODE § 24-12.3(d)*.

The NPTA, like other "flow control" statutes, impermissibly grants preference to local interests by depriving competitors of access to the local market. *C & A Carbone, Inc.*, 511 U.S. at 386. The NTPA secures favored incumbents the right to service lucrative transmission lines by "squelch[ing] competition in" transmission "service altogether, leaving no room for investment from outside." *Id.* at 392. The NTPA limits transmission lines, which are an instrumentality of interstate commerce connected to the interstate electrical grid. Interstate transmission lines are critical to the flow of commerce as they transmit electricity. *See New York v. FERC*, 535 U.S. at

7 (explaining that electricity becomes part of a vast pool of energy that constantly moves in interstate commerce when it enters the grid.).

The NTPA discriminates against interstate commerce in favor of local entities. Vandalia may exercise its police power to issue permits but may not exclude out-of-state entities from competing to provide interstate transmission in the state. Vandalia cannot require ACES and entities "in other states [to] surrender whatever competitive advantages they may possess." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986). Courts have routinely struck down similar laws that protect incumbent industries by limiting competition from non-local businesses in interstate commerce. *C & A Carbone, Inc.*, 511 U.S. at 392. The NTPA encourages economic isolationism by prohibiting out-of-state entities' access to in-state resources, which serves "the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 578 (1997).

ii. The NTPA, in effect and purpose, discriminates against interstate competition to protect Vandalia's transmission incumbents.

Even if the NPTA does not discriminate on its face, this court must still strike it down under the DCC because it burdens interstate commerce in its purpose and its effect. The Court may find that States engage in economic protectionism based on a law's discriminatory purpose or discriminatory effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). The Court has found discriminatory effects when a state reserves benefits to entities "according to the extent of their contacts with the local economy" without any consideration of beneficial ownership or ultimate control. *Lewis*, 447 U.S. at 41. While states can enact laws that have the purpose and effect of encouraging domestic industry through its police powers, the "Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus Imports, Ltd.*, 468 U.S. at 271.

The name "Native Transmission Protection Act" alone suggests a protectionist purpose, and the NTPA's historical background supports that finding. The senator who introduced the bill described it as a direct response to FERC Order 1000 and its elimination of "a *federally* recognized right of first refusal." R. at 9.[5] LastEnergy argued that it was necessary to keep transmission lines in the hands of "more responsive in-state" companies and to restore the "status quo" from before Order 1000. *Id.* A representative of MAPCo described the bill as giving Vandalia's utilities the first chance to invest in *federally* planned transmission projects and urged the Senate Committee not to "encourage third-party transmission owners to buy and build transmission services in Vandalia." *Id.* The origins of the NTPA show that Vandalia purposefully sought to burden interstate commerce.

Vandalia cannot establish a non-protectionist purpose for the NTPA because Vandalia's purpose of promoting local industry rather than discriminating against out-of-state entities is irrelevant. States may not "build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. City of Baltimore*, 100 U.S. 434, 443 (1879). Otherwise, states could secure exclusive benefits for the citizens and products of that state by subjecting industries to discriminatory laws. *Id.* at 442

[5] The goal of Order 1000 was to increase competition in the market for regional transmission lines. Transmission Planning & Cost Allocation by Transmission Owning and Operating Pub. Utils., 136 FERC at ¶ 256. Before Order 1000, many regional plans gave ROFRs to existing transmission facilities. This allowed incumbents to let non-incumbents identify promising opportunities for new transmission facilities, then exercise their ROFR to construct and operate these facilities without competition.

The NTPA's effect independently proves that the law discriminates against interstate commerce. ACES and other transmission developers that do not qualify as incumbents do not have the privileges afforded to incumbents when competing in PJM's transmission market for building projects. For example, plans for the Mountaineers Express, a transmission line with PJM approval, cannot proceed for at least 18 months. R. at 9. After 18 months, VPSC may still deny ACES's permit even if neither utility exercises its ROFR. This would force ACES into individual contract negotiations with private landowners, skyrocketing the project's cost for ACES and PJM ratepayers.

The NTPA discriminates against interstate commerce in its purpose and effect and should not remain valid. The NTPA purposefully burdens interstate commerce, as its name proudly proclaims. The NTPA also burdens all interstate transmission utilities. ACES must wait 18 months or enter expensive private negotiations to build a line PJM has already approved. R. at 9. Vandalia's purposeful encumbrance on interstate commerce must not stand.

iii. Vandalia has not satisfied its high burden of justifying its discriminatory statute because the state has failed to show a legitimate purpose.

Vandalia has no legitimate local interest that the NTPA advances. A state law that "[d]iscriminat[es] against interstate commerce in favor of local business or investment is *per se* invalid" unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc.*, 511 U.S. at 392. The NTPA "must be invalidated" unless Vandalia can show that its law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys., Inc. v. Dept. of Env. Quality of State of Or.*, 511 U.S. 93, 100-01 (1994). Economic protectionism cannot be the crux of a State's thriving or struggling industry. *Bacchus Imports, Ltd.*, 468 U.S. at 273. This is a strict test and the "State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.'" *Oregon Waste Sys., Inc*, 511 U.S.at 101 (quoting *Hughes v. Oklahoma*, 441 U.S. at 337). Vandalia fails this test.

Vandalia cannot justify the NTPA as an attempt to promote the State's struggling local transmission utilities by preventing competition. The DCC does not distinguish between thriving and struggling industries. *See Bacchus Imports, Ltd.*, 468 U.S. at 272-73. (holding a state's motive of promoting local industry rather than discriminating against out-of-state products irrelevant); *and Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (rejecting the argument that sustaining the state's coal-mining industry justified discriminating against out-of-state coal).

The NTPA discriminates against interstate commerce on its face, in its purpose, and in its effects. The name and history of the NTPA display Vandalia's facially discriminatory intent. The legislature wrote the NTPA to counteract the unwanted impact of FERC Order 1000. The NTPA stifles the ability of interstate transmission utilities to compete for projects going through Vandalia. The NTPA increases rates for all PJM ratepayers and serves only conjectural local benefits. Vandalia cannot satisfy its high burden of justifying its discrimination against interstate commerce, so the NTPA should not stand.

c. <u>Even if the NTPA were not protectionist, it fails the *Pike* Test because it unconstitutionally burdens interstate commerce, and the state has other means to effectuate its claimed local interests.</u>

Even if the NTPA applies even-handedly, it would still violate the DCC because it fails the *Pike* test. The Court will uphold an even-handed state statute if it furthers a legitimate local interest with only incidental effects on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court uses a balancing test to determine whether the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Id.* The test depends on the nature of the local interest involved, and whether the state could promote it with a lesser impact on interstate commerce. *Id*.

Vandalia has not pointed to any legitimate local interest that outweighs the burden on interstate commerce. Vandalia holds onto the notion that the NTPA benefits the local coal and transmission industries, but these benefits excessively burden PJM, ACES, and all other out-of-state transmission competitors. PJM ratepayers must pay for all interstate transmission services. The NTPA drives transmission costs up by forcing out-of-state transmission utilities to wait 18 months to build or enter private negotiations. Vandalia cannot charge all PJM ratepayers for unidentified local benefits.

The NTPA halts ACES's plans for the Mountaineer Express and the Rogersville Project.[6] Instead of refusing to take any action on ACES's permit for the Vandalia portions of the Mountaineer Express, Vandalia could, at minimum, review Mountaineer Express to see whether it aligns with their speculative local benefits. R. at 10. The NTPA forces ACES to wait 18 months to see whether LastEnergy and MAPCo will exercise their ROFR. Regardless, it will cause delays and additional costs to ACES and PJM. ACES must wait to construct the Mountaineer Express. PJM must wait to include the incumbents in the regional transmission plan. PJM must wait to approve Vandalia's permit.

Vandalia's position in the PJM grid makes competition especially important. Vandalia ranks among the top states in the interstate transfer of electricity. R. at 4. In 2021, only four other states sent more electricity out of state. *Id.* Yet, only two utilities serve Vandalia. *Id.* Granting these two utilities an effective 18-month interstate transmission monopoly makes for bloated and

[6] The Mountaineer Express will increase the capability of the regional grid to accommodate the 1,800 MW electrical output from the Rogersville Energy Center that ACES plans to build. R. at 5.

balkanized transmission. FERC's competitive solicitation process ensures lower rates for consumers. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016). R. at 6. The NTPA increases consumer rates. Thus, the NTPA creates excessive burdens without justifiable local benefits.

The NTPA violates the DCC. It is subject to virtually *per se* rule of invalidity because it discriminates against interstate commerce on its face, in its effect, and in its purpose. Moreover, the state has other means to effectuate its local interest. Even if the NTPA is even-handed, the law still fails the *Pike* test and violates the DCC.

CONCLUSION

For these reasons, the District Court's order dismissing the Complaint and denying the preliminary injunction should be reversed.

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 *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Moot Court Competition at West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,

Team No. 33