In the United States Court of Appeals for the Twelfth Circuit

Case No. 16-01234

State of Franklin,	)	
Appellant,	)	
	)	
v.	)	Appeal from D.C. No. 16-02345
	)	
Electricity Producers Coalition,	)	
Appellee.	)	

Appeal From the United States District Court

For the Eastern District of Franklin

Brief for Appellant

Team No. 3

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Jurisdictional Statement

This suit challenged the validity of action by the State of Franklin as unconstitutional. R. at 12. As such, the District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1331. The District Court entered a final order on November 7, 2016. R. at 12. Franklin appealed this judgment on December 6, 2016. R. at 13. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

1. Whether Section 1 of the Energy Diversification and Expansion Act ("EDEA" or "the Act"), as enacted by Franklin and administered by the Franklin Public Service Commission ("PSC"), is "field pre-empted" under the Supremacy Clause of the U.S. Constitution, given the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce.

2. Whether Section 1 of EDEA, as enacted by Franklin and administered by the Franklin PSC, is "conflict pre-empted" under the Supremacy Clause of the U.S. Constitution, given that FERC—the agency charged with administering the Federal Power Act—has determined that market-based processes approved and overseen by FERC are the preferred means of achieving a reliable and reasonably priced electricity supply within the U.S.

3. Whether Section 2(a) of EDEA, as enacted by Franklin and administered by the Franklin PSC (and other state agencies in Franklin), is invalid under the dormant Commerce Clause of the U.S. Constitution, given the geographic limitation of "certified biomass feedstock" under EDEA to areas primarily located within the state of Franklin.

4. Whether Section 2(b) of EDEA, as enacted by Franklin and administered by the Franklin PSC, is invalid under the dormant Commerce Clause of the U.S. Constitution, given the geographic limitation of "eligible facilities" to customer- sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin.

Statement of the Case

Appellee, the Energy Producers Coalition ("EPC"), brought suit against appellant, the State of Franklin, seeking a declaratory ruling that reflected their belief that sections of EDEA are unconstitutional. R. at 12. EPC argued that the Carbon Assistance Payments violate the Supremacy Clause of the U.S. Constitution because the Federal Energy Regulatory Commission ("FERC") retains exclusive authority over "the sale of electric energy at wholesale in interstate commerce . . . ." *Id.* Additionally, EPC argued that the increased biomass requirements of EDEA violate the dormant Commerce Clause because they have a discriminatory effect on interstate commerce. R. at 12. In July, both parties filed cross-motions for summary judgment. *Id.* On November 7, 2016, the District Court granted the EPC's motion for summary judgment. *Id.* The State of Franklin now appeals from that final judgment. *Id.*

Statement of the Facts

I. Energy Market Background

In 1996, Franklin restructured its energy markets to promote competition. R. 5. In some states, the same entity controls the generation, transmission, and distribution—the final retail sale to consumers. *Id*. In contrast, Franklin's electricity market is decentralized: different entities control the generation, transmission, and distribution of electricity. *Id*. Independent power producers first generate electricity, and then distribution utilities buy that electricity wholesale "through [direct,] bilateral contracts or through competitive wholesale markets . . . regulated by [FERC]" and sell it directly to retail consumers. *Id*.

These markets are administered by independent, nonprofit entities.[1] *Id.* The PJM Interconnection ("PJM"), the entity that serves all of Franklin, also serves "all or parts of 13 mid-Atlantic and Midwestern states and the District of Columbia." *Id.* Consistent with FERC regulations, PJM runs auctions for short term energy (same-day or next-day) and long-term capacity ("to ensure the availability of an adequate supply of power at some point far in the future") where buyers and sellers make bids for buying and selling energy and capacity. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016); R. at 11. Energy generators place bids with the lowest price they will accept for selling their energy or capacity. *Id*. Energy distributors place bids with the highest price they will pay for buying energy or capacity according to their share of overall projected demand. *Id.* PJM determines the price where the supply meets demand—*the clearing price*—and that is the price paid for energy or capacity, regardless of what price individuals actually bid. *Id.*

PJM is further divided into 21 locational marginal pricing ("LMP") zones, which

[1] These entities are called Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs").

function as sub-markets that determine pricing based on the relative ability of transmission facilities to transfer energy to the zone. R. 5-6 ("Because low-cost energy cannot reach all demand due to inadequate transmission, the marginal cost of energy varies by location . . . ."). "The relative prices prevailing in the LMP zones can be used as a rough indicator of locations where . . . additional generation capacity[] may be necessary." R. at 6.

II. Enactment of Franklin's Energy Diversification and Expansion Act

In January 2016, the State of Franklin—the then third-largest coal producing state in the country—derived more than four-fifths of its electricity generation from coal. R. at 3. Franklin's coal production, however, decreased significantly in the previous years due to additional availability of natural gas, declining prices of renewable energy, and more stringent environmental regulations. *Id*. Several coal plants within Franklin neared premature retirement as financial distress overtook the industry. *Id*. Franklin faced a potential loss of coal-fired plants, which would have threatened the reliability of the entire energy generation system within the region. *Id*. Fortunately, Franklin also has a great deal of forests, which could be used as biomass to serve independently as an alternative fuel source or could be co-fired with coal at an energy generating plant. *Id*.

Responding to the dire circumstances in the coal industry and the potential energy uses of its already plentiful forests, the State of Franklin enacted the Energy Diversification and Expansion Act ("EDEA"). *Id*. Three main programs comprise the EDEA. *Id.* First, EDEA § 1 provides that Franklin will supply financial assistance to coal-fired generating plants serving the state through Carbon Assistance Payments ("CAP"). *Id*. Second, EDEA § 2(a) requires energy distribution companies to obtain at least 15% of their energy supply from energy generating plants that are co-fired (coal and "certified biomass feedstock"). R. at 4. Third, EDEA § 2(b)

provides a carve-out for customer-sited combined heat and power ("CHP") or cogeneration facilities fueled with biomass.[2] *Id*.

[2] Unlike the requirement in EDEA §2(a), biomass obtained for customer-sited facilities need not be certified by the state. R. at 4.

Summary of the Argument

The Carbon Assistance Payments are not field pre-empted because they do not interfere with wholesale rates. In order to determine whether a state act is pre-empted by Congress, courts look to whether the act intruded on a field that Congress intended the federal government to occupy solely. Here, Congress made clear that the field of FERC's authority is wholesale electricity rates. The Carbon Assistance Payments do not set prices or force generators into the PJM Electricity Market, unlike the program declared unconstitutional in *Hughes*. Further, the Carbon Assistance Payments do not otherwise *directly* affect wholesale rates because they do not target wholesale rates in their application. There is also a longstanding tradition of state regulation of energy generation. This is recognized not only in the statute, but by the Supreme Court and FERC itself. The Carbon Assistance Payments merely regulate generators, well within their traditional authority.

The Carbon Assistance Payments are not conflict pre-empted. When determining whether state acts are conflict pre-empted by Congress, courts look to whether complying with both state and federal law is impossible or if the state acts "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal citations omitted) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989)). Here, administering or receiving Carbon Assistance Payments and complying with the Federal Power Act are not impossible. The payments are merely subsidies and nothing in the Federal Power Act prohibits either the giving or receiving of the subsidies. Further, the Carbon Assistance Payments do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress because they do not affect the wholesale market rates enough to interfere with the FERC market mechanism.

Section 2(a)(4) of the EDEA that requires biomass be "certified biomass feedstock" does not violate the dormant Commerce Clause. The "certified biomass feedstock" requirement does not discriminate on its face, in effect, or by purpose. When the state's action does not discriminate the appropriate standard to access the state's action is the Pike balancing test. When applying the Pike balancing test the court looks to determine whether the benefit of the state law outweighs the burden on commerce. In our case, the benefits of using biomass identified by the state are the recoverability, sustainability and decrease in greenhouse gases. However, even if the court finds that the stricter review applies, section 2(a)(4) is still constitutional. Section 2(a)(4) would pass the stricter standard because the state has legitimate purpose in regulating energy needs and given the circumstances, using biomass is the only available alternative.

Section 2(a)(3) of the EDEA that establishes a "carve-out" for customer connected to the electrical grid does not violate the dormant Commerce Clause. The "carve-out" only affects the distributors that are connected to the grid in Franklin and customers connected to the grid. Since the regulation only applies to those that choose to be a part of the grid, the regulation does not affect out-of-state commerce. Further, the regulation does not create a barrier to commerce because it still allows other state to receive the "carve-out" if they choose to connect to the grid within Franklin. Because section 2(a)(3) does not discriminate against out-of-state commerce, the Pike balancing test applies to determine if the state action violates the dormant Commerce Clause. The "carve-out" passes the balancing test because the incentive based "carve-out" to use renewable energy does not affect the interstate commerce.

Argument

I. Standard of Review

This Court should review the District Court using a *de novo* standard. The District Court disposed of the suit at summary judgment, which is a matter of law, not of fact. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). Unlike when making "[f]indings of fact," where the trial court has an "opportunity to judge the witnesses' credibility," the trial court is in no better position than an appellate court to resolve issues of law. Fed. R. Civ. P. 52(a)(6). As such, this Court should apply a less deferential standard. Although the Supreme Court has not explicitly stated a standard of review for a grant of summary judgment, every federal appellate court applies the *de novo* standard. *See, e.g.*, *Henry v. Purnell,* 652 F.3d 524, 531 (4th Cir. 2011), *cert. denied,* 565 U.S. 1062 (2011). This court should follow the lead of every other appellate court to consider the question.

II. The Carbon Assistance Payments Are Not Field Preempted Because They Do Not Interfere With Wholesale Rates.

A. The Carbon Assistance Payments Do Not Set Prices Or Force Generators Into The PJM Market

The Supremacy Clause of the U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Courts find state laws are "field pre-empted" and thus invalid where the state "regulates conduct in a *field* that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Congress intended FERC to occupy the field of wholesale electric energy sales. The

Federal Power Act ("FPA") empowers FERC with the authority to regulate "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The statute further defines the "sale of electric energy at wholesale" to mean "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d). FERC also has jurisdiction to remedy "any rule, regulation, practice, or contract *affecting* such rate . . . [that] is unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a).

The Carbon Assistance Payments do not set prices or force generators into the PJM Market. In *Hughes*, the Supreme Court invalidated a program that went far beyond the Carbon Assistance Payments. *Hughes*, 136 S. Ct. at 1292. In that case, Maryland responded to energy reliability issues stemming from a perceived lack of energy generation within the state. *Id.* at 1294. PJM does not have the authority to create new energy generators, so Maryland sought to increase energy generation within the state on its own. *Id.* at 1293-94. Maryland accepted bids from companies to construct a new energy generation facility within the state. *Id.* at 1294-95. Maryland petitioned FERC to extend FERC's program for guaranteeing the rates at which new generators would be paid from three years to ten years. *PJM*, 126 F.E.R.C. ¶ 61,275 (2009). FERC ultimately the state's request. *Id.* Instead, Maryland required energy distributors to sign 20-year "contracts for difference" with the winning bidder, CPV. *Hughes*, 136 S. Ct. at 194-95. If the price specified in the contract was higher than the clearing price at auction, distributors were required to pay CPV the difference. *Id*. at 1295. But if the contract price was lower than the clearing price, CPV was required to pay distributors the difference. *Id.* Regardless of the clearing price—the wholesale market rate—CPV received the contract price. This guaranteed a stream of income to the energy generator regardless of the market price to incentivize new generation

within the state. The Supreme Court found this to violate the Supremacy Clause because it "condition[ed] payment of funds on capacity clearing the [PJM] auction." *Id*. at 1299.

But unlike the Maryland program, the Carbon Assistance Payments are unconditional: Franklin does not "condition payment of funds on capacity clearing the auction." The fatal flaw of the Maryland program was that it forced energy generators to still sell capacity at auction. Unlike a traditional bilateral contract, energy distributors only paid to CPV the *difference* between the clearing price and the contract price. The Carbon Assistance Payments, however, are a subsidy. If the generator wishes to sign bilateral contracts with distributors, they may. Here, the energy generators are not required to participate in the PJM auction. And also unlike the Maryland program, the subsidies do not set the price. Energy generators will never have to pay distributors: the Carbon Assistance Payments are one-way payments. Energy generators will receive the subsidies no matter the price for which they sell their capacity. Unlike Maryland's program, the Carbon Assistance Payments neither set the price nor force the energy generator into the market.

B. The Carbon Assistance Payments Do Not Otherwise *Directly* Affect Wholesale Electricity Rates

The Carbon Assistance Payments do not otherwise *directly* affect wholesale electricity rates. When a law affects both retail and wholesale rates, courts look to "'the *target* at which [a] law *aims*' in determining whether a State is . . . improperly regulating wholesale sales." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016) (quoting *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015)). Further, the Supreme Court has "limit[ed] FERC's 'affecting' [of wholesale energy rates] jurisdiction to rules or practices that '*directly* affect the [wholesale] rate.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 774 (internal citation omitted) (quoting *California Independent System Operator Corp. v. FERC*, 372 F. 3d 395, 403 (D.C. Cir. 2004)).

In *Electric Power Supply Association*, FERC made an order concerning the energy markets' acceptance of demand response provider bids. *Id.* at 769-71. Demand response refers to compensation for aggregators of electric retail customers inducing those retail customers to decrease their energy use during peak times. *Id.* at 769-770. During peak electricity usage times, electricity generation prices are the highest. *Id.* Instead of producing more energy, these demand response providers make payments to retail customers to *not* use electricity, and as a direct result, energy distributors purchase less energy. *Id.* at 769. The Supreme Court held that the D.C. Circuit erred in determining the program regulated the *retail*—as opposed to *wholesale*—market by "'luring . . . retail customers' into the wholesale market, and causing them to decrease 'levels of retail electricity consumption,'" *Id.* at 772 (quoting *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 223-24 (D.C. Cir. 2014)). The Court further noted "the Commission's justifications for regulating demand response *are all about*, and only about, improving the wholesale market." *Id.* at 776. In the terms of *Oneok*, FERC specifically *targeted* wholesale rates when it regulated demand response.

The target of Franklin in compensating energy generators is clear: additional energy generation to preclude a massive shortfall of energy capacity. Without adequate capacity, the state cannot provide for reliability of energy within the state, possibly leading to energy black outs. Further, the Carbon Assistance Payments will only have a direct—if any—effect on wholesale rates. Wholesale rates are only involved *indirectly* simply due to *potential* differences in supply. The energy generators have not yet shut down, thus there is no change in supply. While maintaining capacity, no additional energy is being thrust into use either through bilateral contracts or the market. Although the generators *could* shut down and there would be less supply, and potentially increased wholesale rates, this is speculative. It is not even clear that the

rates are affected at all. Unlike in the Maryland program that forced the energy generator into the market, the ability to choose a bilateral contract here makes the connection between compensation of the energy generator and wholesale rates even more tenuous. In typical bilateral contracts, an energy distributor—as opposed to the generator—"is considered the owner of that capacity for purposes of the auction." *Hughes*, 136 S. Ct. at 1293. Thus, a different entity who is not even receiving the subsidy could bid the capacity into the auction. The Carbon Assistance Payments only have the potential to incidentally affect wholesale rates. But "[s]tates, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 136 S. Ct. 1298 (citing *Oneok*, 135 S. Ct. at 1592). "[N]o one could claim that FERC's regulation of . . . activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates." *Oneok*, 135 S. Ct. at 1600.

C. There Is A Longstanding Tradition Of State Regulation Of Energy Generation

There has been a strong tradition of state regulation of energy generation, which is the target of Franklin's program. Congress expressly precluded FERC from regulating "facilities used for the generation of electric energy."16 U.S.C. § 824(b)(1). The Supreme Court has also noted that the "[n]eed for new power facilities [and] their economic feasibility . . . are areas that have been characteristically governed by the States." *Hughes*, 136 S. Ct. at 1292 (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 205 (1983)). Even FERC itself has not claimed jurisdiction over subsidies to energy generators such as the Carbon Assistance Payments. FERC has asserted its opinion that its jurisdiction does "not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their

state." *PJM*, 137 F.E.R.C. ¶ 61,145 (2011) (order on petition for rehearing). It has further declared that its "intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives." *Id*. Franklin, in enacting the Carbon Assistance Payments to increase energy capacity in the state, acted within the full authority the statute, courts, and even FERC itself recognizes. The target of the Carbon Assistance Payments has long been recognized to be within the state's authority.

III. The Carbon Assistance Payments Are Not Conflict Pre-empted

A. Administering Or Receiving Carbon Assistance Payments And Complying With The Federal Power Act Are Not Impossible.

"[C]onflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok*, 135 S. Ct. at 1595 (internal citations omitted) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989)). The Court has occasionally termed these two categories "impossibility" and "frustration-of-purpose." *Wyeth v. Levine*, 555 U.S. 555, 612 n.4 (2009) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000)). "Pre-emption is ordinarily not to be implied absent an 'actual conflict.'" *English*, 496 U.S. at 90 (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)). The Supreme Court has warned against "seeking out conflicts between state and federal regulation where none clearly exists." *Id*. (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). Further, in a conflict "pre-emption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the *clear and manifest purpose* of Congress.'" *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

It is not impossible to administer or receive Carbon Assistance Payments and comply with regulations administered by FERC. The Carbon Assistance Payments are merely subsidies. In order to satisfy the impossibility requirement of conflict pre-emption, the Carbon Assistance Payments would have to be in direct opposition to a federal requirement that energy generators not receive financial compensation, which is not present here. Further, the subsidies are not incompatible with the market based processes and bilateral contracts regulated by FERC. The Carbon Assistance Payments do not forbid energy distributors from participating in the market or signing these bilateral contracts. Because it is not impossible to administer or receive Carbon Assistance Payments and comply with FERC regulations, the impossibility category of conflict preemption should not apply.

B. The Carbon Assistance Payments Do Not Stand As An Obstacle To The Accomplishment And Execution Of The Full Purposes And Objectives Of Congress

Further, the Carbon Assistance Payments do not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 135 S. Ct. at 1595 (internal citations omitted) (quoting *ARC America Corp.*, 490 U.S. at 100, 101). FERC, and thus Congress, has a clear purpose in monitoring and regulating retail rates. It has a statutory mandate to remedy rates that are "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). In this case, as discussed *supra*, there is only a potential that Franklin's program will even *indirectly* affect wholesale rates. States are given a large ability to regulate the "[n]eed for new power facilities," *Hughes*, 136 S. Ct. at 1292 (quoting *Pacific Gas & Elec. Co*, 461 U. S. at 205), which has a direct effect on supply—and thus price—without "standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 135 S. Ct. at 1595 (internal citations omitted) (quoting *ARC America*

Corp., 490 U.S. at 100, 101). If the state has the ability to *add* new generating capacity to the market, surely it has the ability to keep the generating capacity it already has.

IV. Section 2(A)(4) Of The EDEA That Sets Criteria And Makes Determination Of "Designated Biomass Growing Regions" Does Not Violate The Dormant Commerce Clause.

The Constitution grants Congress the authority "to regulate commerce . . . among the several states." U.S. Const. art I, § 8, cl. 3. The Court has long held that the Commerce Clause includes a dormant aspect. *See Gibbons v. Odgen*, 22 U.S. 1 (1824); *Cooley v. Board of Wardens*, 53 U.S. 299 (1852). To determine whether a state has violated the dormant Commerce Clause, a court must decide (1) if the state action only incidentally burdens commerce, or (2) if the state action affirmatively discriminates against out-of-state commerce. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

If the state action only incidentally burdens commerce and does not affirmatively discriminate against out-of-state commerce, courts review the action with less rigor. *Id.* Courts apply the balancing test expressed in *Pike*, which weighs (1) whether the action serves a legitimate local purpose; and (2) whether the burden imposed is clearly excessive to the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). When applying the balancing test, there is a presumption that the Act is constitutionally valid *Id.* To overcome this presumption, there must be a showing that the state law is "*clearly excessive* in relation to the punitive local benefit." *Id.* (emphasis added).

When state action discriminates against out-of-state commerce on its face, in practical effect, or by purpose, courts strictly scrutinize the measure. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). To survive strict scrutiny, the state must show (1) the law serves a legitimate local purpose; and (2) no other alternative means could promote the state's legitimate purpose just as

well without discriminating against out-of-state commerce. *Id.* at 322. States do not serve a legitimate purpose if their action merely creates an "economic barrier protecting a major local industry against competition from outside the State." *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951). Further, state action will not withstand strict scrutiny "if reasonable and adequate alternatives are available." *Id.* However, if there are no other means to advance a legitimate state purpose, the state can overcome this presumption of invalidity. *See Taylor*, 477 U.S. at 146. Further, the Court has determined that the Commerce Clause "cannot be read" as requiring a state to not act and wait for potentially irreversible environmental damage. *Id.*

A. Section 2(A)(4) Does Not Discriminate Against Out-Of-State Commerce On Its Face, In Effect, Or By Purpose.

The "certified biomass feedstock" requirement and determination process do not discriminate against out-of-state commerce on their face, in effect, or by purpose. When state law discriminates on its face, it does so *expressly as written*. In *City of Philadelphia v. New Jersey*, the Court found the language of the statute facially discriminatory because it expressed that "no state shall" place garbage within the state without receiving prior approval from the state. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 617-18 (1978). In that case, the Court looked at the express language to determine that the statute was facially discriminatory. Therefore, to establish whether a state law discriminates on its face, courts must look at the express language of the statue. The language of the statute at hand makes clear that the statute does not discriminate. The Designated Biomass Growing Regions of EDEA § 2(a)(4) may be areas both "within the state of Franklin" as well as in "the adjoining states." R. at 9. Section 2(a)(4) does not express a preference for Franklin's own biomass or create barriers against out-of-state biomass. Further, the application of the statute does not discriminate against out-of-state commerce because some area identified as a Designated Biomass Growing Region is outside of

the state entirely. This supports the conclusion that the law does not discriminate on its face.

Section 2(a)(4) of the EDEA's requirement that the biomass obtained be "certified biomass feedstock" does not have the effect of discriminating against biomass outside of the state. Proving that a state law discriminates in effect is a harder type of discrimination to prove because a law can be facially neutral but have discriminatory effect. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In our case, the abundance of biomass available in Franklin supports the state's identification of Franklin-Allegheny State Forest and Central Appalachian Forest. Franklin is the third most forested state in the nation and is covered in 77% percent forest. This means that Franklin has a readily available source of biomass within its borders. Since Franklin has an abundant amount of biomass within its borders, it is practical and efficient for them to identify areas largely within its borders. Just because one of the benefits of using biomass is increased jobs does not mean the regulation violates the dormant Commerce Clause. Using resources within the state means that Franklin will save money on transporting biomass and can maintain a steady supply of biomass. Further, there are other legitimate reasons why they have identified these areas because there is a cost associated with retrieving biomass from a farther distance away. This could include the cost of transporting the biomass and an increase in emissions from transporting biomass in trucks. These factors will contribute to an increase in the price of the biomass, the price to charge consumers and time it takes to retrieve biomass. These factors support the fact that Franklin is not directly discriminating against biomass from other states but instead focusing on the practical aspect of identifying an efficient and practical source of biomass**.** Any beneficial outcome like a boost in economy or jobs in Franklin is a side effect of the regulation and not the intended effect.

Further, the factors Franklin relies on in identifying a forest supports that it does not

discriminate in effect or by purpose. Franklin primarily looks at growth rates, recoverability and substantiality to determine if the forest is suitable to produce enough biomass. Looking for a source with these characteristics serves the purpose of ensuring a consistent source of biomass as well as ensuring that prices will not increase because of the scarcity of the biomass. Suitability of forest residue is important for Franklin because residues produced during harvesting of forest products, fuel-wood extraction from forestlands, and residues generated at primary and secondary wood processing facilities could provide sufficient feedstock to support a biomass industry. R. at 3. Recoverability is important because it helps determine how quickly the biomass will be able to replenish to provide a steady stream of biomass. With these factors in mind, the state's identification of the Franklin-Allegheny State Forest and Central Appalachian Forest is not a result of discrimination. Franklin's identification of the two areas is a result of careful consideration of the various scientific requirements that determine residue compatibility, suitability and recoverability. For these reasons, the "certified biomass feedstock" requirement does not discriminate in effect against another state's biomass.

The purpose of the Section 2(a)(4) proves that it was not established to have a discriminatory purpose. Discriminatory purpose occurs when the intended purpose of the regulation is to discriminate. The purpose of Section 2(a)(4) is to create a sustainable source of biomass to be used for their renewable energy requirements because of recent decline in coal availability and more restrictive federal regulations. R. at 3 Because of these market forces, Franklin has suffered significantly in its capacity to produce energy and is expected to continue to suffer losses in the near future based on these circumstances. R.3 PJM interconnection, which manages the regional power grids, lacks the authority to order new electrical generation as a means of mitigating local electrical system reliability concerns and solve other issues related to

the lack of local generation. R. at 5 Therefore, the underlying purpose of Franklin passing this statute to compensate for the anticipated losses in its capability to produce energy. When a state statute does not discriminate facially, in effect or by purpose the applicable standard of review to apply is the *Pike* balancing test.

B. Section 2(A)(4)'s Determination Of Designated Biomass Growing Regions Passes The Lesser Standard Of Review And Is Therefore Valid Under The Dormant Commerce Clause.

When applying the balancing test, section 2(a)(4) is valid because the benefits of using biomass identified by Franklin outweigh the incidental burden placed commerce. When a law does not discriminate against commerce the standard to apply is the lesser standard used in *Pike*. Section 2(a)(4) regulates even handedly because it allows biomass from the "adjoining states" as well as within the state to be considered "certified biomass feedstock." The burden that has been created here is that the identified areas that contain "certified biomass feedstock" have been identified largely as areas within Franklin. R. at 9. However, the burden is not substantial because Franklin has identified areas outside of its states. This establishes that Franklin is committed to using resources outside of their state which is further supported by the fact that they have identified 256 acres in the state of Vandalia.

In our case, the environmental benefits of using the identified areas both in and outside of Franklin are the recoverability of the forest biomass, the suitably of forest residue, long term stability of the resource, decrease in greenhouse emissions and the accessibility of the biomass. The social benefits include the potential to decrease the unemployment rates in and out the state and revitalize areas that suffered disproportionately from the downturn in the coal industry. In *Pike* the Court weighed the likely benefit to arise with the burden to determine if the regulation was clearly excessive. Given the fact that the state is not relying solely on its own biomass, has

identify areas outside of the state, and will receive social and economic benefits, the burden placed on commerce is outweighed by the benefits. Further, there is no indication that the measures that the state has taken are clearly excessive. The state has looked at sustainability, recoverability, residues and the economic effects before it makes any determination. Based on these factors, section 2(a)(4) passes the *Pike* balancing test and is therefore constitutionally valid.

C. Even If The Stricter Scrutiny Applies, Section 2(A)(4) Still Passes And Is Therefore Valid Under The Dormant Commerce Clause.

Even if the stricter standard did apply, section (2)(a)(4) would still pass the heightened review. In *Maine,* the Court held that a state statute that affirmatively discriminates against interstate commerce was constitutional because it protected the state from significant damage to the state's environmental wellbeing. In that case, the state passed the heightened review because the state had a legitimate purpose in protecting their native species from parasites from outside of the state and had no other alternative. *Maine,* 477 U.S. at 147-48. The Court further added that state could not be expect to sit ideally by and wait for irreversible environmental damages to occur before it acts to avoid such consequences. *Id.* at 148. In our case, Franklin is facing an anticipated loss of generating capacity within the region that could threaten the reliability of the electricity generating system. R.3 The environmental impacts of relying on coal and other market forces left Franklin in a position that required them to make changes before there was a significant impact on its ability to produce energy. PJM, which regulates the local power grid, lacks the authority to order new generation as a means of mitigating local electrical system reliability concerns and solve other issues related to the lack of local generation. R. at 4. Because of these factors, Franklin needed to act to prevent further economic and environmental lost. Franklin has a legitimate interest in producing and maintaining energy the only issue is whether there are other less burdensome alternatives.

The decision to rely on certified biomass feedstock is the only alternative that is currently available given the circumstances. Currently, 77% of the state is covered in forest, making it the third largest forested state. Therefore, the only abundant renewable resource available to supplement its energy needs would be by utilizing this cheaper renewable source. Since there is currently no other alternative given PJM's inability to aid and the available large availability of biomass, there is no other option for Franklin. Because Franklin has a legitimate state purpose in producing and maintain energy and is utilizing the only available alternative section 2(a)(4) passes strict scrutiny standard of review.

V. Section 2(B) Of The EDEA's Identification Of "Eligible Facilities" To Receive Carve-Outs Does Not Discriminate Against Commerce Because It Only Affects Interstate Commerce

The carve-out in section 2(b) for customer-sited combined heat and power (CHP) does not violate the dormant Commerce Clause because it only affects customers in Franklin. The Supreme Court has not determined the constitutionality of similar state programs that incentivize the use of renewable resources. Determining whether a state incentive program discriminates against commerce requires a detailed look at the programs and effects that the incentives have on out-of-state transactions. In the Ninth Circuit case of *Rocky Mountain*, the court was presented with a similar issue on whether a state Low Carbon Fuel Standard (LCFS) violated the dormant Commerce Clause. *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1078 (9th Cir. 2013). In that case, the LCFS required a 10% reduction in carbon intensity for fuels that were being transported into the state by 2020. *Id.* at 1081. The issue in this case was whether the LCFS allowed the state to discriminate against out-of-state ethanol and regulate extraterritorially in violation of the dormant Commerce Clause. *Id.* at 1077. On appeal, the court reversed the lower court decision and found that the regulation only placed limits on California and did not regulate

extraterritorially. The court stated that the states cannot mandate compliance with their energy policies in out-of-state transaction "but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants." *Id.* at 1103. The court found that the regulation avoided being protectionist because the regulation was to combat the effect of greenhouse gasses emissions associated with dirty fuel. *Id*. at 1106-07. The court also added that residents and people general would suffer greatly if California did not encourage the use of alternative fuels. *Id.* at 1107.

In that case, the LCFS standard did not impose any additional requirements on the importation of ethanol outside of the state (i.e did not control how it was sold or imported). This case is similar to our case because the carve-out only applies to those customer and distributors who choose to be connected to the grid in Franklin. In order for out-of-state companies to get this benefit, they will have to be a part of the grid in Franklin. The carve-out does not create barriers for out-of-state facilities to be a part of the distribution grid if they choose. For the state to give this incentive to customer or distributors outside of the state it would have to regulate out-of-state transaction which would run afoul of the prohibition on regulating extraterritorially.

Again, in response to a state incentive program a district court held that a state RES program did not discriminate against commerce or regulated extraterritorially. *Energy and Environment Legal Institute v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2014). In that case, the state of Colorado required that certain sized electric utility receive a certain percentage of their energy from renewable sources. *Id.* For example, the RES required that Cooperative electric associations receive 20 % of their energy from a renewable resource with that amount increasing over the next 10 years. *Id.* The court reasoned that just because Colorado was connected to a grid that supplied power regionally did not mean that the RES requirements effectively discriminated

against out-of-state commerce. *Id*. The court reasoned that the RES only affects out-of-state generators that freely choose to sell to a Colorado utility. *Id.* at 1179.The fact that the RES may influence or incentive out-of-state companies to sell more renewable energy does not make it invalid under the dormant Commerce Clause. *Id.* at 1181. When applying the Pike balancing test, the court stated that "[t]he critical inquiry is whether market shift caused by the Renewables Quota places a greater burden on interstate commerce than is placed on intrastate commerce." *Id.* at 1183. The court concluded that there was a failure to show that the regulation disproportionately affected out-of-state commerce. *Id.* at 1174.

This case is analogous to our case because the carve-out functions in a similar way. The carve-out works as a way to incentive people to produce their own energy and influence others outside of the state to do the same. Like in that case, the critical point in assessing benefits based carve-outs is whether or not it has an effect on out-of-state transaction. Here, because the carve-out would only apply to distributors and companies within Franklin, it does not affect interstate transactions. Further, any outside company can reap the benefits of the carve-out if they choose to be connected to the grid within Franklin. Because the carve-out does not discriminate on its face, in effect, or by purpose the standard of review to apply is the *Pike* balancing test.

When applying the Pike test, it is clear that the benefits of the carve-out outweigh a potential burden. One benefit of the carve-out is that it incentivizes people to produce their own source of renewable energy. This is a benefit to the states and surrounding states because it motivates people to produce their own cleaner energy. The benefit of not relying so heavily on coal is that there will be a decrease in greenhouse gas emission which will result in cleaner air. The carve-out could potentially save customers money in producing their own energy from biomass. This will also help the state by taking some of the energy burdens off of the state. Like

in *Epel* there must be a showing that this requirement burdens out-of-state commerce and that this burden is clearly excessive. This burden had not been met because the carve-out is not mandatory and only applicable to those connect to the distribution grid in Franklin serving Franklin customers: it does not affect out-of-state commerce. Further, the record does not reflect that there has been an impact on the commerce or the grid as a result of the carve-out. For these reasons section 2(b) passes the *Pike* balancing test.

Conclusion

For the foregoing reasons, Appellant, the State of Franklin, respectfully requests that this Court reverse the judgment of the District Court and grant Appellant such other and further relief as this Court deems proper.

Respectfully Submitted,

Team No. 3.

[The Brief Certificate of Compliance is emailed separately.]

[The Certificate of Compliance with Official Rules is emailed separately.]

Certificate of Service

Pursuant to Official Rule IV, Team Members representing appellant, the State of Franklin, 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 13, 2017.

Respectfully submitted,

Team No. 3