C.A. No. 16-01234

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

STATE OF FRANKLIN,

Appellant,

V.

ELECTRICITY PRODUCERS COALITION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF FRANKLIN

BRIEF OF APPELLEE ELECTRICITY PRODUCERS COALITION

ORAL ARGUMENT REQUESTED

TEAM 15

Counsel for Appellee

I. TABLE OF CONTENTS

A. TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1331 (2016) and issued its judgment on November 7, 2016. Notice of appeal was timely filed. This Court has appellate jurisdiction under 28 U.S.C. § 1295 (2016), and federal question jurisdiction over the Constitutional claims pursuant to 28 U.S.C. §1331.

II. STATEMENT OF THE ISSUES PRESENTED

1. Whether Section 1 of EDEA is preempted because it intrudes upon FERC's exclusive jurisdiction by setting prices for energy and capacity transactions on the interstate wholesale market.

2. Whether Section 1 of EDEA is preempted because it conflicts with FERC's regulation of the interstate wholesale market.

3. Whether Section 2(a) of EDEA is invalid under the dormant Commerce Clause because it requires "certified biomass feedstock" to areas primarily located within the State of Franklin.

4. Whether Section 2(b) of EDEA is invalid under the dormant Commerce Clause because it restricts "eligible facilities" to customer-sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin.

III. STATEMENT OF THE CASE

The Federal Regulatory Regime

The electricity industry is a classic example of a network industry. Natural gas, water, telephones, railroads, and electricity all share similar characteristics; at one end sits the supplier and at the other lies the customer. Because producers and customers are linked together through transmission and distribution lines, customers in a vertically integrated utility are at the pricing mercy of the producer. Today, there are roughly 200 privately owned electric utilities, which are referred to in the industry as investor-owned utilities (IOUs). Lincoln L. Davies et al., Energy Law and Policy 292 (2014) [hereinafter Energy Law]. Traditionally, IOUs were structured as vertically integrated firms, meaning that the utility would own and operate all of the functions necessary to generate electricity and deliver it to end-users. *See New York v. F.E.R.C.*, 535 U.S. 1, 5 (2002). However, as IOUs began selling their excess electricity across state lines, the Supreme Court ruled that states are prohibited from regulating these wholesale transactions and that regulatory authority belonged to Congress. *See Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co*., 273 U.S. 83, 89-90 (1927).

In response to *Attleboro*, Congress enacted the Federal Power Act (FPA), which established a new federal agency charged with providing "effective federal regulation of the expanding business of transmitting and selling electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." *New York v. F.E.R.C.*, 535 U.S. at 6. This includes the power to determine "what rates and charges made, demanded, or received… for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." 16 U.S.C. § 824d(a) (2016). Section 201(b) provides FERC with jurisdiction over "all facilities for such transmission or sale of electric energy" but preserves some authority for the states over generation and transmission facilities. *Id*.; 16 U.S.C. § 824(b)(1) (2016). Nevertheless, Congress clearly indicated that the preserved state authority must yield to federal authority under the FPA. Energy Law at 363.

The Expansion of the Federally Regulated Wholesale Market

The turn of the century brought changes to the electricity industry, especially as the vertically integrated utility structure collapsed in areas of the United States. Passage of the Public Utility Regulatory Policies Act (PURPA) incentivized renewable energy and fostered competition among energy suppliers. PURPA imposed an obligation on incumbent, vertically integrated utilities to buy power from small, renewable energy competitors. 16 U.S.C. §§ 2601 *et* *seq*. (2016). However, because “the owners of transmission lines” often denied generating entities “access to their transmission lines on competitive terms and conditions,” *Transmission Access Policy Study Grp. v. F.E.R.C.,* 225 F.3d 667, 682 (D.C. Cir. 2000), FERC passed Order No. 888 to require transmission line owners to offer non-discriminatory access. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services, 61 Fed. Reg. 21,540 (May 10, 1996). These and other regulatory measures paved the way for explosive growth in wholesale transactions over the past two decades. *New York v. F.E.R.C.*, 535 U.S. at 7. Many states separated their vertically integrated structures into generation, transmission, and distribution utilities, which lead to cheaper electricity rates as generators sold their electricity in the interstate market.

PJM and the Reliability Pricing Model

To help control the interstate wholesale market, FERC encouraged participants to organize regional transmission organizations (RTOs) to facilitate wholesale market operations in large portions of the country. Energy Law at 435-36. The PJM Interconnection, LLC (PJM) is an RTO with a vast region across 13 states, stretching from Chicago to the District of Columbia, and northward to Michigan. R. at 5; *Illinois Commerce Comm'n v. F.E.R.C.*, 576 F.3d 470, 473 (4th Cir. 2009). Subject to FERC’s oversight and approval, PJM ensures that its wholesale market will supply all retail sellers within PJM enough electricity to meet consumer demand through a bidding process. PJM Interconnection, LLC, http://www.pjm.com (last visited Feb. 8, 2017).

The Proceedings and Parties

Plaintiff Electricity Producers Coalition (EPC) is a national trade association representing leading competitive electric power suppliers that are involved in competitive wholesale and retail electricity markets. R. at 12. These suppliers have significant financial investments in electricity generation and marketing operations within Franklin and the greater PJM operating region, and rely on PJM's long-term price signals to decide whether to make investments in existing or new generation facilities. *Id*. Consequently, when Franklin enacted EDEA the EPC suffered financial harm because it lost investments in generating new assets. *Id*.

On July 1, 2016, EPC commenced this action in the Federal District Court for the Eastern District of Franklin, following the Franklin Public Service Commission's (Commission) EDEA Implementation Order and the Biomass Eligibility Determination Order by Franklin's Department of Natural Resources and Division of Commerce. *Id.* EPC brought this action to challenge EDEA's constitutionality under the Supremacy Clause and the dormant Commerce Clause. It also sought injunctive relief from EDEA's implementation. *Id.*

Shortly after the commencement of the action, the District Court granted EPC's motion for summary judgment. The court found EDEA field and conflict preempted, as well as invalid under the dormant Commerce Clause. *Id*. at 12-13. Defendants timely filed their appeal to the Twelfth Circuit Court of Appeals.

IV. STATEMENT OF THE FACTS

Franklin's Energy Economy Depends Heavily on Coal

This matter arises out of an attempt by Franklin to preserve its coal and biomass industries. Franklin sits in the mid-Atlantic region, and is bordered by the states of Vandalia and Allegheny. R. at 3, 6. Rich with coal and timber, Franklin is the third largest coal producer, and third most forested state in the country. *Id*. at 3. In fact, 77 percent of the state contains hardwood and softwood forests. *Id*. at 3, 9.

Because Franklin is "the third-largest coal producing state" in the nation, it "suffered dramatic declines in coal production" as alternative forms of electricity generation expanded, including natural gas, wind, and solar power. *Id*. at 3. Coal-fired generation plants are a valuable part of Franklin's economy because they ensure coal production to meet the energy generation plants' needs, preserve coal severance and property tax revenues for both the state and its municipalities, and employ numerous coal miners. *Id*. Also, the loss of local coal plants could reduce electric generating capacity and hinder Franklin's ability to attract industrial and manufacturing jobs to the state. *Id.*

Franklin began using a horizontal style electricity market in 1996 pursuant to its Electric Customer Choice and Competition Act, to provide "competition at the retail level." *Id.* at 5. Essentially, Franklin's distribution utilities sell electricity to individual consumers, and purchase that electricity at wholesale from independent power producers, typically the PJM. *Id*. Three of the 21 Locational Marginal Pricing (LMP) zones fall within Franklin, either wholly or in part: Franklin East (100 percent in Franklin), Vandalia South (25 percent in Franklin), and Allegheny North (about 33 percent in Franklin). *Id*. at 6.

Franklin's Response to the Regional Energy Transition Preserves the State's Economy

As coal plants have retired across the mid-Atlantic region, electrical generation capacity has reduced and PJM has not encouraged new generating capacity. *Id*. at 4. With many of the state's large coal plants "in financial distress" and facing retirement, Franklin's legislature enacted the Energy Diversification and Expansion Act (EDEA) to "[preserve] the economic viability of the existing coal-fired generating plants and [stimulate] the development of a biomass industry." *Id*. at 3. When Franklin enacted EDEA, coal generated 82% of its electricity, natural gas generated 10%, wind generated 5%, biomass generated 2%, and solar photovoltaic generated 1%. *Id.*

The Energy Diversification and Expansion Act Protects Local Industries

EDEA has three primary elements at issue: (1) Section 1 charges the Franklin Public Service Commission (Commission) with providing financial incentives, specifically Carbon Assistance Payments (CAPs), to eligible coal-fired plants serving Franklin; (2) Section 2(a) requires local distribution companies to purchase a portion of their electric supply from co-fired plants using at least 15 percent certified biomass feedstock; (3) Section 2(b) establishes a carve-out for "customer sited" combined heat and power (CHP) facilities fueled with biomass. *Id*. at 3-4.

First, the CAPs are given to designated eligible facilities, which are selected on the following factors: a facility's location within one of Franklin's LMP zones, its reliance on coal "as its primary fuel source" (at least 10 percent of which must be mined in Franklin), and its financial need to continue operations. *Id*. at 6. Once a facility is selected for CAPs, the plant owner "would be offered a ten-year contract administered by the Franklin State Energy Office" (SEO). *Id*. at 7. The Commission selected five coal-fired generating plants under Section 1(a)(6) of EDEA, four of which are within Franklin's borders and the fifth lies in neighboring Vandalia. That one out-of-state facility is within the Vandalia South LMP zone, which services both Franklin and Vandalia. *Id*. at 6-7.

Second, Franklin's Renewable Portfolio Standard (RPS) was enacted in 2007 and requires the five distribution companies within Franklin to purchase 20 percent of the electricity sold to Franklin-based customers from renewable resources by 2020, and 30 percent by 2030. *Id.* at 8. Section 2(a) of EDEA modified these RPS requirements by requiring the distribution companies to procure energy from co-fired plants burning at least 15 percent "certified biomass feedstock." *Id*. The distributors must acquire at least 3 percent of their energy from these co-fired plants by 2020, and at least 5 percent by 2030. *Id.*

EDEA passed into law in January 2016. *Id*. at 9. By June 2016 Franklin's Department of Natural Resources and Division of Commerce designated two biomass growing regions: the Franklin-Allegheny State Forest and Central Appalachian Forest. *Id*. The forests total 1184 acres, with 928 acres within Franklin alone. *Id*. These regions were selected for the wood species "particularly suited for biomass" as well as the high unemployment rates, varying between 9.7 and 14.6 percent, from coal mine closures. *Id*.

Third, CHP facilities are required "to be located on the customer side of the meter and be connected to the distribution grid of an electric distribution company serving customers within Franklin." *Id*. at 10. Hence the CHP facilities are located "exclusively" within Franklin. *Id*. A portion of the energy procured under the RPS must be purchased from these CHP facilities, specifically 0.5 percent by 2020 and 1.0 percent by 2030. *Id*.

Franklin's Findings Lead to EDEA's Enactment

Franklin's decision to enact EDEA rested on Franklin State University's biomass research and a variety of legislative findings. First, Franklin State University's research revealed the residue from forest harvesting and forestland fuel wood could supply "sufficient feedstock to support a biomass industry." *Id*. at 3. In addition, the legislature found that new co-fired generating facilities could provide new opportunities for employment within Franklin, diversify the state's energy portfolio and economy, reduce power prices, increase energy capacity, provide environmental benefits, and bolster energy efficiency for local consumers. *Id*. at 4-5. Upon EDEA's enactment, Franklin's governor issued a statement citing EDEA's economic benefits, "including the 'necessary and vital support' for the coal miners in Franklin, 'our state's most important industry.'" *Id*. at 5. Rather than allowing an energy transition within Franklin, the legislature has decided to preserve its coal-based economy.

V. SUMMARY OF THE ARGUMENT

This case arises under the Supremacy Clause and dormant Commerce Clause of the United States Constitution. The Appellee in this action is a coalition of companies involved in wholesale and retail sales of electricity markets. The Appellant is the State of Franklin, which attempted to enact legislation (EDEA) to protect its coal and biomass industries from a national transition to natural gas and renewable resources. This dispute arose because of Franklin's interference with the federally regulated interstate wholesale market for electricity (Section 1 of EDEA) and economic protectionism from geographic limitations on resources and facilities located primarily within Franklin (Sections 2(a) and 2(b) of EDEA). The District Court found federal law preempts Section 1, while Sections 2(a) and 2(b) are invalid under the dormant Commerce Clause. This Court should affirm the District Court's findings.

First, Section 1 of EDEA is preempted by federal law because FERC holds exclusive authority to set wholesale energy and capacity prices in order to preserve just and reasonable energy costs. Section 1 of EDEA also interferes with the wholesale power markets by setting different energy costs for local coal-fired generation plants. Thus EDEA directly conflicts with FERC's regulations because it compromises otherwise prudent investments, limits energy efficiency, and frustrates FERC's price signal system.

Second, Sections 2(a) and 2(b) trigger the dormant Commerce Clause because the geographic limitations for suitable biomass, electric power, and eligible CHP facilities are barriers to interstate commerce. This economic balkanization unduly burdens interstate commerce, specifically competing resources and energy from the interstate market. Franklin could use non-discriminatory alternatives to accomplish its goals.

If allowed, these regulations create an unconstitutional permit to burden interstate commerce and preempt federal law, and ultimately oppose a century of case law precedent. While Franklin presents legitimate interests in protecting its state economy and residents, at its heart this statute is an attempt to thwart a regional transition from coal-burning plants to natural gas and renewable energy for the sole purpose of protecting Franklin's most valuable industry: coal and its coal miners. Franklin cannot regulate or isolate itself at the expense of its fellow states. Therefore, this Court should hold the EDEA regulations unconstitutional to follow precedent and preserve *justice in rem*.

VI. STANDARD OF REVIEW

Preemption questions must be reviewed *de novo*. *See Farina v. Nokia Inc.*, 625 F.3d 97, n.20 (3d Cir. 2010); *see also Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, n.3 (2d Cir. 2011). However, the regulations challenged under the dormant Commerce Clause receive one of two standards: either (1) strict scrutiny for facial discrimination, or (2) a more flexible, but still scrutinizing, approach to the balancing test weighing the burden on interstate commerce against the local benefits. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (stating, "facial discrimination invokes the strictest scrutiny"); *Wyoming v. Oklahoma*, 502 U.S. 437, n.12 (1992) (stating less strict scrutiny may be applied in the balancing test); *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

VII. ARGUMENT

A. Section 1 Of EDEA is preempted under the Supremacy Clause of the Constitution.

The Supremacy Clause makes the laws of the United States “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. Thus, federal law preempts contrary state law. Congress can preempt state law expressly with explicit statutory language or by implication when a Federal law occupies the same field as or conflicts with state law. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). In all preemption cases, courts assume that the powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). Section 1 of EDEA is (1) field preempted because it intrudes into the regulatory turf of FERC's exclusive jurisdiction, and (2) conflict preempted because it frustrates the purpose of price signals to achieve a reliable and reasonably priced electricity supply within the U.S. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Arizona v. United States,* 132 S. Ct. 2492, 2502 (2012).

1. <u>Section 1 is preempted because it intrudes upon a field exclusively reserved to FERC under the Federal Power Act.</u>

Courts can infer Congress' intent to occupy a given field of regulation if it has legislated comprehensively, leaving no room for the states to supplement, or when “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice,* 331 U.S. at 230. Hence, “state law is [field] preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.” *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

Section 1 is a blatant effort to interfere with FERC's exclusive authority under the FPA because FERC undeniably possesses the exclusive power to authorize “rates and charges made, demanded, or received ... for or in connection with” wholesale capacity sales. 16 U.S.C. §

824d(a) (2016). A state may not regulate in a field exclusively reserved to the federal government, yet that is precisely what Section 1 does: it ousts FERC's approved rates and terms with ones more to Franklin's liking. Because Franklin (a) displaced federal regulation in an exclusively federal field, and (b) went beyond its jurisdiction to regulate generation and retail sales, Section 1 is plainly preempted by federal law.

a. The District Court correctly concluded that Section 1 of EDEA intrudes upon FERC's exclusive authority to regulate wholesale energy and capacity rates.

Through the FPA, Congress clearly intended for FERC to occupy the wholesale sales of electric power exclusively, including the prices at which those sales occur. 16 U.S.C. §824(b)(1). The language states that FERC has jurisdiction over "the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce." *Id.* Furthermore, the FPA grants FERC jurisdiction over all facilities for the transmission and wholesale sales of electric energy in interstate commerce. *Id.* This broad authority expressly permits broad jurisdiction over the rates for wholesale transactions, and left "no power in the states to regulate … sales for resale in interstate commerce." *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964); *New York v. F.E.R.C.*, 535 U.S. 1, 21 (2002) (holding "the FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been previously subject to state regulation").

It is particularly clear how pervasive and exclusive federal regulation of wholesale sales is when examining wholesale energy and capacity sales with PJM and other wholesale-market operators. After all, FERC must oversee and approve of virtually every aspect of the auctions where PJM purchases and resells energy and capacity at wholesale. FERC exercises its exclusive authority through these auctions to ensure just and reasonable rates. 16 U.S.C. § 824d(a). FERC pre-approves the wholesale rates in advance as it oversees the processes through which PJM will conduct its auctions, and determines the market-clearing price for its energy and capacity purchases. Therefore, a sale to PJM at the market-clearing price is a price FERC deemed just and reasonable. Accordingly, any effort to alter the price of a sale to PJM is an effort to alter the wholesale rate approved by FERC.

Through EDEA, Franklin engaged in price altering with its CAPs program. EDEA establishes a ten year contract where eligible coal-fired generating plants serving Franklin are given financial incentives through CAP payments. The CAPs displace the just and reasonable rate FERC determines, and replaces it with a new rate set by Franklin. Section 1 plainly guarantees eligible coal-fired generating plants an increased dollar-per-megawatt-hour rate, determined by Franklin's Commission, for each unit of energy or capacity sold to PJM for ten years. R. at 7. Consequently, the CAP program alters whatever price FERC determines to be just and reasonable.

This Court must follow the precedent set by the Supreme Court in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). In *Talen Energy Marketing*, the Court addressed whether a state scheme that guarantees a generator a price different from the FERC approved price for its wholesale electricity sales to a federally regulated wholesale-market operator intrudes on the exercise of FERC's exclusive jurisdiction over wholesale rates for electricity sales. *Id.* at 1296. The State of Maryland, similar to the State of Franklin, wanted to incentivize reliable electricity supply to support economic growth and expanded employment opportunities for its citizens. *Id.* at 1294. To do so, Maryland created a program where it entered into a 20-year contractual agreement with the petitioner. *Id.* Under the terms of the contract, the petitioner sold its capacity to PJM through the auction, but – identical to the CAP program – received the contract price rather than the clearing price for these sales to PJM. *Id.* at 1297. The *Talen Energy Marketing* court held, similar to the District Court, that Maryland's program had the practical effect of interfering with wholesale power markets and invaded FERC's "regulatory turf." *Id.*

As the District Court correctly concluded, Franklin's Act has the practical effect of interfering with the wholesale power market. *Talen Energy Marketing* highlights that a state does not need to directly regulate the interstate market to invade into FERC's jurisdiction. *Id.; see also F.E.R.C. v. Electrical Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016) (stating, "[t]he FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result") (internal quotations omitted).

b. <u>By establishing the price ultimately received by the eligible coal-fired generating plants for their actual physical energy and capacity sales to PJM, Franklin plainly intruded upon the exclusive authority of FERC.</u>

The FPA gives FERC the exclusive authority to determine not just what PJM should pay coal-fired generating plants, but what the eligible coal-fired generating plants "receive … for or in connection with" their sales to PJM, which are undeniably wholesale sales. 16 U.S.C. § 824d(a). Congress explicitly subordinated the states' jurisdiction over generation to FERC's jurisdiction over wholesale sales. *See id.;* 16 U.S.C. § 824(b)(1) (stating, FERC "shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for generation of electric energy") (emphasis added). While FERC does not have jurisdiction over retail sales or generating facilities, *Talen Energy Mktg., LLC*, 136 S. Ct. at 1299, Congress has established a "bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." *Mississippi*

Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 374 (1988). Any state regulation that crosses that bright line is preempted.

According to Appellant, the CAP program operates completely independently from PJM's capacity auction process, and merely provides supplemental payments to a narrowly defined group of generators in order to avoid capacity deficiencies within its borders. R. at 13. But no matter how broad that states' authority to incentivize existing generation may be, it does not include the power to regulate the "rates and charges made, demanded, or received" by a generator "for or in connection with" wholesale sales – much less alter the rates that FERC *has already approved* for those wholesale sales. 16 U.S.C. § 824d(a).

Franklin's scheme cannot be saved by the fact that the State Energy Office (SEO) administers the CAPs to a narrowly defined group of generators. The SEO collects CAPs, distributes them among the five eligible coal-fired generating plants, and effectively dictates a different price than what FERC approved to be just and reasonable. Even if the payment from an LMP zone to an eligible coal-fired generating plant is not a payment received for the interstate wholesale sale to PJM, it is a payment received in connection with that sale. In short, although states retain significant authority under the FPA over the sitting and construction of power plants, Franklin's jurisdiction is limited by FERC's exclusive authority to set wholesale energy and capacity prices.

2. <u>Section 1 is conflict preempted because its guaranteed pricing for eligible coal-fired power plants aborts and conflicts with FERC's basic purposes of its capacity market.</u>

Section 1 not only intrudes upon a field reserved exclusively to FERC, it also squarely conflicts with FERC's regulations in that field. Courts infer "conflict preemption" when there is a conflict between a state law and a federal statute or regulation. Courts identify such a conflict when State law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also Geier v. American Honda Motor Co.,* 529 U.S. 861, 873 (2000) (striking down state law that interfered with federal policy carefully crafted to achieve an appropriate balance of passive restraint devices). Because the FPA grants FERC exclusive jurisdiction over wholesale sales and any practices by jurisdictional sellers directly affecting those sales, state law is preempted even without a direct conflict with federal law. *Arizona v. United States,* 132 S. Ct. at 2502.

The reliability pricing model (RPM) underlying PJM's capacity auction is designed to "provide[] long-term price signals to attract needed investment in the PJM region through a competitive auction process" on a three-year forward basis. *PJM Interconnection, LLC,* 132 FERC ¶61,173, at ¶61,870 (Aug. 26, 2010). Central to this model is the considered judgment of PJM and FERC that "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability." *Talen Energy Mktg., LLC*, 136 S. Ct. at 1294. The system FERC has in place ensures generators who cannot produce capacity as efficiently as their competitors will be forced to improve their facility or exit the market. Hence, the market clearing price results in "more efficient sellers and lower prices." *PJM,* 117 FERC ¶61,331 at ¶141. When market clearing prices are higher, it sends a signal to investors that there is a constraint on the amount of capacity that can be imported from outside the area – signaling where investment is most needed. Any effort to compromise those price signals stands as an obstacle to FERC's purposes and objectives.

Section 1 of EDEA stands as an obstacle to the accomplishment and execution of the RPM. The RPM sets a three-year guarantee for some new generating sources for a dependable rate of return on investment. *PJM Interconnection, LLC,* 132 FERC at ¶61,870. Section 1, however, sets a price different than what FERC determined just and reasonable, and guarantees that price for ten years. Essentially, EDEA guarantees a dependable rate of return for existing coal-fired generators for far longer than the RPM provides for new generating facilities, many of which need to recuperate the cost of an entirely new facility. Because the CAP program extends for ten years, it gives the coal-fired generating plants a competitive advantage that conflicts with the RPM underlying PJM's capacity auction.

Such an assault on FERC's regulatory scheme frustrates the price signals that encourage new generation within Franklin. Investors who would build new generation facilities will look to other areas where the price signals indicate a higher return on investment. Consequently, Section 1 creates uncertainty in the marketplace, in the market structure, and regulatory risks that other participants must consider for future investment. By replacing FERC's judgment with its own policy considerations, Franklin created a conflict with federal law and a significant obstacle to the accomplishment of federal regulatory objectives.

B. EDEA's geographic limitations on biomass feedstock and eligible facilities discriminate against out-of-state competitors and burden interstate commerce.

Article I, Section 8 of the Constitution grants Congress the power to regulate commerce "among the several states." U.S. Const. art. I, § 8, cl 3. Within this Commerce Clause courts inferred the dormant Commerce Clause, which "directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). This doctrine stems from the Framers' concerns of "economic Balkanization" that plagued the Colonies under the Articles of Confederation, *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979), and the belief that "each state is made the greater by a division of its resources." *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 255 (1911). Thus the dormant Commerce Clause prevents economic protectionism where regulations benefit a State's economic interests by burdening its interstate competitors. *See Limbach*, 486 U.S. at 273.

The state of Franklin enacted two unconstitutional regulations through EDEA: (1) Section 2(a) which violates the dormant commerce clause by geographically limiting the origins of the biomass feedstock, and (2) Section 2(b) which violates the dormant commerce clause by requiring Franklin residents to purchase locally produced energy.

1. <u>Section 2(a) of EDEA is an unconstitutional burden on interstate commerce, and imposes a facially discriminatory regulation by geographically restricting eligible biomass.</u>

Determining whether a regulation is invalid under the dormant Commerce Clause requires the application of three tests: (1) whether the regulation is facially or incidentally discriminatory, (2) whether it serves a legitimate local purpose, and (3) whether alternative means were available to achieve that local purpose. *See Id. at* 273-74; *Maine v. Taylor*, 477 U.S. 131, 151 (1986); *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970). If a regulation is facially discriminatory it is invalid per se and warrants the strictest scrutiny from the court, but if the discrimination is incidental and based on a legitimate, local interest then the court must balance the local interest served against the burden imposed on interstate commerce. *See Limbach*, 486 U.S. at 273-74; *Hughes v. Oklahoma*, 441 U.S. at 336-37; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Pike,* 397 U.S. at 142. This court should hold Section 2(a) of EDEA unconstitutional because it (a) is facially discriminatory and invalid per se, and (b) seriously burdens interstate commerce when non-discriminatory means are available to accomplish Franklin's purposes.

a. <u>Section 2(a) of EDEA is facially discriminatory and invalid per se because it effectively confines the Designated Biomass Growing Region to its borders.</u>

"Where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *City of Philadelphia v. New Jersey*, 437 U.S. at 624. Because commerce includes "[a]ll objects of interstate trade," *id. at* 622, natural resources like coal and timber fall under the Commerce Clause. *See generally Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992); *South Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). Consequently, while a state retains the power to regulate its natural resources, it cannot do so at the expense of interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. at 337-39.

For example, in *Wyoming v. Oklahoma*, an Oklahoma statute required Oklahoman coal-fired electric plants to burn at least ten percent Oklahoma-mined coal. 502 U.S. at 440. This regulation effectively promoted Oklahoman interests ahead of other states, especially Wyoming, which lost a "significant excess" in mining capacity "such that the loss of any market [could not] be made up by sale elsewhere." *Id*. at 445-46. The Supreme Court held this statute facially discriminatory, and ultimately unconstitutional, because "[s]uch a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States *based solely on its origin*." *Id*. at 455 (emphasis added); *see also Oregon Waste Sys., Inc. v. Department of Envtl. Quality of State of Or.*, 511 U.S. 93, 100 (1994) (holding an Oregon statute facially discriminatory for its basis on a "geographic distinction"). Likewise, in *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, a flow ordinance that required local processing of solid waste was facially discriminatory because the local government required its resources to be confined and processed within its borders. 511 U.S. 383, 402 (1994). "The essential vice in laws of this sort," the Supreme Court ruled, is that "the offending local laws hoard a local resource… for the benefit of local businesses that treat it." *Id.* at 392.

Like in both *Wyoming v. Oklahoma* and *C & A Carbone, Inc.,* Franklin is hoarding its own resources for local consumption at its co-fired generating plants. Section 2(a)(3) of EDEA requires certified biomass feedstock to be harvested from a "Designated Biomass Growing Region." R. at 9. Section 2(a)(4) of EDEA then defines a Designated Biomass Growing Region as an "area *within the state of Franklin* and the adjoining states thereto" identified by Franklin's state agencies as an area containing suitable biomass and that is economically depressed. R. at 9 (emphasis added).

While technically Franklin restricted the availability of biomass feedstock to an interstate area, Franklin geographically limited the borders such to favor its own state at the expense of its competitors, including the first and second most forested states in the country. Approximately 78 percent – 928 of 1184 acres – of the suitable forests are within Franklin alone, and the remaining 256 acres are still harvested from forests within Franklin, but from an area just across its border in Vandalia. Though the geographic limitations do not conform perfectly to state lines, they achieve the same effect by confining the designated biomass feedstock to areas within Franklin's grasp. Franklin cannot impose biomass requirements solely on origin, just as Oklahoma could not confine its coal for in-state use. Thus Section 2(a)'s strict geographic limitations are facially discriminatory against interstate competitors and invalid per se.

b. <u>Section 2(a) of EDEA imposes an undue burden on interstate commerce when Franklin has alternate, non-discriminatory means available to achieve its purposes.</u>

Even if this court applies *Pike*'s balancing test over *Hughes*' facial discrimination analysis, the burden on interstate commerce outweighs the legitimate purposes Franklin asserts. Where a state

> regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike, 397 U.S. at 142. While *Pike*'s balancing test presents an opportunity for legitimate state interests to be upheld over incidental discrimination, a state still cannot impose a burden on interstate commerce where non-discriminatory alternatives are available. *See id*.; *Taylor*, 477 U.S. at 140. So far the Supreme Court has recognized a variety of legitimate state interests, *see Pike*, 397 U.S. at 143 (protecting the reputation of state crop growers is a legitimate interest); *Taylor*, 477 U.S. at 142-43 (conserving the environment is a legitimate interest), but to survive, the statute must be justified by a legitimate purpose – other than economic protectionism – and be the least discriminatory path to achieve that purpose. *Limbach*, 486 U.S. at 274; *Taylor*, 477 U.S. at 151. Because "the evil of protectionism can reside in legislative means as well as legislative ends," a regulation's ultimate purpose cannot isolate the state's economy or pose a burden on interstate commerce however legitimate the State's purpose is. *City of Philadelphia v. New Jersey*, 437 U.S. at 626-27.

In contrast, in *Maine v. Taylor* the Supreme Court permitted Maine's discriminatory statute barring baitfish importations because of the "physical impossibility" of inspecting baitfish with scientific methods that did not exist. 477 U.S. at 141-42. While "[a] State must make reasonable efforts to avoid restraining the free flow of commerce across its borders…it is not required to develop new and unproven means of protection at an uncertain cost." *Id.* at 147.

While Franklin presents legitimate state purposes in the forms of environmental protection and energy diversification, R. at 4-5, its ultimate purpose and effect is economic protectionism. Indeed, Franklin may prove to be the greatest, most economical venue for biomass feedstock and new facilities, but that is a decision for the interstate market – not Franklin – to make. Franklin cannot force the market into or out of its borders at the expense of its competitors through state regulation. Moreover, unlike in *Maine v. Taylor*, Franklin has alternatives at its disposal. First and foremost, it does not have to limit the biomass to its own borders and those of its neighbors. Franklin may limit the source of the biomass, i.e. timber instead of corn, but it cannot restrict the use of resources based purely on origin, especially when 78 percent of the suitable forests are within Franklin alone. By eliminating the geographic limitations, Franklin can still achieve its purposes of economic development and environmental protection while allowing energy producers to select the most suitable, and the best priced, certified biomass feedstock from Franklin or a number of other states.

2. Section 2(b) of EDEA is invalid under the dormant Commerce Clause by confining "customer-sited" CHP facilities to Franklin and forcing electricity distributors to purchase locally produced energy.

Analysis under the dormant Commerce Clause requires the court to consider the following tests: (1) whether the regulation is facially discriminatory in effect or purpose, (2) whether the regulation serves a legitimate local purpose, and (3) whether non-discriminatory alternatives could have achieved the local purpose. *See Limbach*, 486 U.S. at 273-74; *Taylor*, 477 U.S. at 151; *Pike*, 397 U.S. at 142. This court should conclude that Section 2(b) of EDEA is unconstitutional because its geographic limitations (1) are facially discriminatory and invalid per se, and (2) seriously burden interstate commerce when Franklin can implement non-discriminatory means to diversify its energy portfolio and obtain power from renewable sources.

a. Requiring "customer-sited" CHP facilities is a facially discriminatory regulation that confines the facilities, employees, and produced energy to Franklin.

When the Act discriminates facially and in practical effect the state bears the burden to justify its local interests and show the unavailability of nondiscriminatory alternatives. *See Wyoming v. Oklahoma*, 502 U.S. at 456; *Hughes v. Oklahoma*, 441 U.S. at 336. Just as "the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment," *Pike,* 397 U.S. at 146, "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce… to satisfy local demands." *City of Philadelphia v. New Jersey*, 437 U.S. at 627 (internal citations and quotation marks omitted). Ultimately, "[i]t does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. After all, "our economic unit is the Nation." *Id.* at 623.

Both electric energy and jobs are resources and articles of commerce that cannot be regulated in a way that burdens interstate commerce. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Pike,* 397 U.S. at 146. For example, in *New England Power*, the regulation "prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states." *New England Power Co.*, 455 U.S. at 339. Thus, restrictions on the flow of electricity in interstate commerce constitute economic protectionism and are invalid under the dormant Commerce Clause. *See id. at* 339, 344.

Through EDEA, Franklin erected geographic barriers along its state lines to keep eligible facilities within its borders. Section 2(b) requires the eligible CHP facilities to be "customer-sited," R. at 10, but because all the customer-sited facilities are exclusively within Franklin, the majority – if not all – of the customers are also within Franklin. In addition, distribution companies must purchase a portion of the CHP's generated power under the new RPS requirements. *Id.* These requirements immediately establish a distinction between in-state and out-of-state facilities; now Franklin-based facilities, run by Franklin's residents, locally produce and sell electricity to Franklin distributors for Franklin's energy consumption. Consequently, Section 2(b)'s geographic barriers have confined electricity and employment within the state, and blocked interstate competitors from Franklin's distributors. While not all of the power may come from or remain in Franklin, the state has constructed geographic barriers to withhold at least a portion of its resources. Such economic isolationism is exactly what the dormant Commerce Clause proscribes, and makes Section 2(b) invalid per se.

b. Section 2(b) burdens interstate commerce because it unnecessarily requires distribution utilities to buy locally produced electricity.

Where a state "regulates even-handedly," *Pike* requires a balancing test, weighing the state's legitimate local interest against the burden imposed on interstate commerce. 397 U.S. at 142. However, a state cannot impose that burden on interstate commerce when non-discriminatory alternatives are available to achieve its purposes, or where the 'purposes' proved only to be convenient effects of economic protectionism. *Id.*; *Wyoming v. Oklahoma*, 502 U.S. at 457; *Limbach*, 486 U.S. at 279; *Taylor*, 477 U.S. at 140. The Supreme Court is especially condemning of "geographic distinction[s]" and discrimination that triggers at state lines. *Oregon Waste Sys., Inc.,* 511 U.S. at 99-100; *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193-94 (1994).

While federal jurisdictions have determined that origin alone does not always constitute facial discrimination, courts have closely examined a regulation's purpose and effect to protect against geographic limitations that result in economic isolationism or differential treatment to interstate competitors. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1090–92 (9th Cir. 2013) (holding a regulation valid because it did not economically isolate the state or treat producers differently because of "different sources of generation"); *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 851 (D. Md. 2013) (stating the regulation was not facially discriminatory because it did not "erect any barriers to the sale or transmission of electric energy," nor did it provide a competitive advantage to in-state electricity generation).

For example, in *PPL Energyplus, LLC v. Nazarian*, even though 98 percent of a deliverability area was within Maryland's borders, the regulation "[did] not impose any hindrance on the ability of market participants to buy and sell wholesale energy and related products in the [greater] region." *Nazarian*, 974 F. Supp. 2d at 850, 853. The simple existence of a facility in Maryland did not hinder the market; in fact, it increased the energy and capacity of the entire region. *Id.* at 853-54. The District Court held that the new facility's location within the state alone did not discriminate against interstate commerce because: (1) the regulation did not "erect any barriers to the sale or transmission of electric energy at wholesale"; (2) the regulation did not "act for the explicit purpose of protecting some in-state business"; and (3) the regulation did not "make energy generated outside [the state] a less viable and/or less competitive option for distribution in [the state]." *Id*. at 851-52.

Like in *Nazarian*, Franklin "has a legitimate interest in ensuring that [its] residents have available to them an adequate and reliable supply of electric energy." *Id*. at 854. However, Franklin fails for every reason *Nazarian* succeeded. First, Section 2(b) erects barriers to the sale and commission of electric energy at wholesale. "Customer-sited" CHP facilities not only keep electricity within the state, but block interstate producers from selling to Franklin's distributors. Second, Section 2(b) acts for the explicit purpose of protecting in-state business, specifically co-fired CHP facilities, along with its energy and timber industries. In fact, EDEA was born out of a desire to salvage Franklin's dying coal industry. R. at 3. Third, Section 2(b) makes out-of-state energy a less viable and less competitive option for distribution in Franklin. EDEA's requirements under Section 2(b) specifically require a portion of the energy procured for the RPS to be from Franklin's CHP facilities. By requiring any amount to be purchased in state, Franklin automatically prevents local distributors from purchasing that energy from an interstate competitor, regardless of the market or environmental benefits the interstate transactions could provide. This interference with market forces presents a serious burden on interstate commerce, and should not be allowed simply to protect in-state jobs and industries.

In addition, Franklin has non-discriminatory alternatives available to achieve its economic and environmental purposes. For instance, instead of requiring energy purchases from its eligible CHP facilities, Franklin could simply require energy to be obtained from sustainable resources regardless of location. That is exactly what Franklin did before with the 2007 RPS requirements: Franklin's distribution companies had to purchase 20 percent of their energy from renewable sources by 2020, regardless of the generation source or location. *Id*. at 8. Franklin could also subsidize the construction of CHP facilities to encourage in-state energy production and provide jobs to residents, rather than unconstitutionally requiring an in-state location and in-state energy purchases. In short, there are non-discriminatory methods for Franklin to create employment opportunities, stabilize power prices, and reduce the environmental impact of the energy industry. *Id*. at 5.

C. Section 2(a) and 2(b) of EDEA are not protected by any exceptions to the dormant Commerce Clause doctrine, and thus remain unconstitutional.

Despite the scrutiny applied to economic protectionism, the courts have recognized exceptions to dormant Commerce Clause doctrine where (1) the state is a market participant instead of a regulator, or (2) where the regulation receives express Congressional approval. *See Limbach*, 486 U.S. at 278; *Taylor*, 477 U.S. at 139; *South Cent. Timber Dev., Inc.*, 467 U.S. at 92; *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–39 (1980). However, none of these exceptions apply to Sections 2(a) or 2(b) of EDEA because (1) Franklin is acting as a market regulator, and (2) Franklin never received Congressional approval.

1. Franklin is a market regulator, not a market participant.

The market participant doctrine "differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant" where "only the former is subject to the limitations of the negative Commerce Clause." *Limbach*, 486 U.S. at 277. While "[n]othing in the purposes animating the Commerce Clause prohibits a State… from participating in the market and exercising the right to favor its own citizens over others," *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 810 (1976), the actions of the state must be like those of a private firm rather than traditional governmental functions. *See Reeves, Inc.*, 447 U.S. at 451; *see also Wyoming v. Oklahoma*, 502 U.S. at 459 (stating that the Court would not extend market participation to private utilities).

Here, Franklin is acting as a market regulator because it uses statutory requirements to regulate the local energy industry instead of participating in energy production like a private firm. Section 2(a) and 2(b) impose geographical limitations on the biomass growing regions and the location of CHP facilities, both private industries traditionally subject to governmental oversight. Therefore Franklin is a market regulator, not a participant.

2. <u>Franklin did not receive Congressional approval to burden interstate commerce and discriminate out-of-state competitors through Section 2(a) and 2(b) of EDEA.</u>

The FPA's savings clause reserves State authority for regulation over energy production, and limits FERC's reach "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824. Despite this statutory reservation and the Court's recognition that a State may regulate and preserve "the integrity of its natural resources," *Taylor,* 477 U.S. at 151, the Court also clearly holds that neither of those paths can qualify as Congressional approval. In *Wyoming v. Oklahoma* the Supreme Court ruled, "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause." 502 U.S. at 458; *see also Taylor,* 477 U.S. at 139.

Likewise, in *New England Power Co*., New Hampshire argued that §201(b) of the FPA preserved the State's right to prohibit the exportation of hydroelectric power. The Supreme Court unanimously disagreed, and asserted that "when Congress has not expressly stated its intent and policy to sustain state legislation from attack under the Commerce Clause, we have no authority to rewrite its legislation based on mere speculation as to what Congress probably had in mind." *New England Power Co.*, 455 U.S. at 343 (internal citations and quotation marks omitted). Thus Congressional approval of a State's discriminatory regulation requires clear, express permission; ambiguity and implications cannot support a finding of Congressional approval. *See id.*; *South-Cent. Timber Dev., Inc.*, 467 U.S. at 91 (stating, "in order for a state regulation to be removed from the reach of the dormant Commerce Clause… congressional intent must be *unmistakably clear*") (emphasis added).

In short, the FPA's savings clause – along with its other statutory provisions – fail to convey express authority for either Section 2(a) or 2(b) of EDEA. Without this clear, explicit permission from Congress, Franklin cannot claim this exception to shield EDEA from the dormant Commerce Clause's scrutiny. The savings clause simply reserves Franklin's authority to regulate through Constitutional, non-discriminatory means.

VIII. CONCLUSION

For the foregoing reasons, Appellee urges this Court to affirm the District Court's judgment. The record evidence demonstrates that EDEA is preempted by federal law, and invalidated by the dormant Commerce Clause because it is a protectionist statute that interferes with federal authority. In practical effect, EDEA allows Franklin to exempt itself from an economic and environmental transition from coal to alternative forms of energy. Therefore, this court should affirm the District Court's decision that Sections 1, 2(a), and 2(b) of EDEA are unconstitutional.

IX. Certificate of Service

Pursuant to Official Rule IV, Team Members representing Electricity Producers Coalition 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. 15