**IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT**

C.A. No. 16-01234

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| State of Franklin, | ) | |
| Appellant | ) | |
| | ) | |
| v. | ) | D.C. No. 16-02345 |
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| Electricity Producers Coalition, | ) | |
| Appellee | ) | |
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Appeal from the United States District Court for the Eastern District of Franklin

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BRIEF FOR THE APPELLEE

Team No. 14

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## Jurisdictional Statement

The Federal District Court for the Eastern District of Franklin had jurisdiction over the federal questions posed by this suit pursuant to 28 U.S.C. § 1331. The District Court's grant of summary judgment on November 7, 2016 was a final decision. The appellant timely appealed and this court has jurisdiction pursuant to 28 U.S.C. § 1291. This court should affirm the district court's grant of Electricity Producers Coalition's (EPC's) motion for summary judgment.

## Statement of the Issues Presented

I. Section 1 of the Energy Diversification and Expansion Act (EDEA or the Act) enacted by the State of Franklin and administered by the Franklin Public Service Commission (PSC), is "field preempted" 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.

II. Section 1 of EDEA, as enacted by Franklin and administered by the Franklin PSC, is "conflict preempted" 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.

III. Section 2(a) 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 "certified biomass feedstock" under EDEA to areas primarily located within the state of Franklin.

IV. 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**

The EPC commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin. This was done because of the PSC's issuance of the Biomass Eligibility Determination Order, EPC sought a declaratory order that (1) the Carbon Assistance Payments (CAPs) program violated the Supremacy Clause of the U.S. Constitution by trampling on FERC's exclusive authority of wholesale energy in the interstate market and (2) that the modifications to Franklin's RPS violate the Dormant Commerce Clause of the U.S. Constitution. The District Court issued its decision on November 7, 2016 and granted EPC's motion for summary judgment finding that (1) section 1 of the EDEA is "field preempted" under the Supremacy Clause of the Constitution because of FERC's exclusive jurisdiction (2) Section 1 of the EDEA is also "conflict preempted" under the Supremacy Clause of the U.S. Constitution because FERC is in charge of administering the Federal Power Act and had determined that market-based processes were the best way to achieve more efficient, lower cost power and that the CAP program might discourage potential investors away from electrical generation (3) Section 2(a) of the EDEA is invalid under the Dormant Commerce Clause of the U.S. Constitution because the geographic limitation of "certified biomass feedstock" was limited to areas primarily within Franklin and impermissibly discriminates against biomass from outside the State of Franklin and (4) Section 2(b) of the EDEA is invalid under the Dormant Commerce

Clause of the U.S. Constitution because the geographic limitation on "eligible facilities" to customer sited generation that was connected to the grid that served Franklin customers excluded out of state energy providers. The District Court did not reach Dormant Commerce Clause claims that were asserted by EPC to Section 1 of the EDEA.

**Statement of the Facts**

In January of 2016, the State of Franklin enacted the EDEA. (R. at 3). The stated goal of the act was to preserve the economic viability of the existing coal-fired generating plants and to stimulate the biomass industry. (R. at 3). The Act recognized that the majority of its electrical generation was from coal, 82%, and as the third-largest coal producing state in the country had started to suffer dramatic declines in coal production. (R. at 3). This reduction had been primarily caused due to the advent of shale gas resources in the same region as Franklin as well as the declining price of renewable energy. (R. at 3).

Franklin is the third most forested state in the nation. (R. at 3). Research at Franklin State University showed that wood residues from forestlands, could support a biomass industry. (R. at 3). Further, the biomass could be co-fired with coal at generating plants in order to help the long-term viability of the coal plants. (R. at 3). The State of Franklin embarked on a program that contained three distinct elements: (1) provide for financial incentives, in the form of CAPS to eligible coal-fired generating plants serving Franklin; (2) modify Franklin's existing RPS to impose a requirement on electric distribution companies of 15% "certified biomass feedstock;" and (3) modify Franklin's existing RPS to carve-out for customer-sited combined heat and power CHP facilities fueled with biomass. (R. at 3-4). The Public Service Commission of Franklin PSC was charged with administering the CAP program, identifying coal-fired generating plants eligible to receive CAPs, and to set the level of payments eligible plants can receive. (R. at 6). The Act prescribed the manner in which the CAPs would be administered. (R. at 6). In order to be eligible to receive CAPs, the generators must offer the capacity to the PJM Interconnection. (R. at 7). Upon determination of eligibility by the Franklin PSC, the generating plant owner would be offered a ten-year contract administered by the Franklin State Energy Office (SEO) to receive CAPs. (R. at 7). The amount of CAPs to be sold annually to eligible units would be capped annually at a megawatt hour (MWh) amount that represented the verifiable historic contribution such units have made to the electricity generating mix consumed by retail electricity customers within Franklin. (R. at 7). The SEO, in turn, would collect revenues necessary to fund the CAPs through assessments against the five electric distribution utilities operating within Franklin, based on the proportion of each utility's electric energy load in relation to the total electric energy load served by all utilities within Franklin. (R. at 7). The PSC, in turn, would set rates for each utility that enables such utility to recover the costs of its CAP assessment in the retail rates for electric customers located within Franklin. (R. at 7).

## Summary of the Argument

I. Section 1 of the EDEA, which creates financial incentives to promote the coal industry is field preempted under the Supremacy Clause of the United States Constitution. The Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction under the Federal Power Act and several other federal statutes over the sale of electric energy and capacity at wholesale in interstate commerce. Since the EDEA provides incentives to coal producers that discriminate against other industries by benefiting the coal industry, the EDEA goes against the congressional mandate enacted by the FERC to promote free and open energy markets. The CAPs subsidize the coal industry across the state lines of Franklin, Vandalia, and Allegheny, which directly implicates interstate commerce. In addition, the CAPs provided by the EDEA indirectly affect wholesale pricing of energy. Consequently, the EDEA is field preempted and unconstitutional.

II. Section 1 of the EDEA enacted by the State of Franklin which provides financial incentives in the form of CAPs is conflict preempted under the Supremacy Clause because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Federal Power Act (FPA) and the authority granted by the FPA to the Federal Energy Regulatory Commission (FERC) in controlling wholesale interstate sales. Because CAPs eligibility hinges on the condition that qualified generators must offer capacity to the PJM Interconnection, the CAPs program indirectly affects wholesale market signals by affecting the clearing price of the PJM and its sub-markets. Having the condition precedent to place capacity bids on the PJM in order to receive CAPs, coupled with the guarantee that costs will be recovered after placing a bid makes qualified generators less likely to care what their capacity bid price is. When qualifying generators can carelessly place capacity bids on the market, the bids placed will ultimately increase or decrease the wholesale market's clearing price depending on the price of the bids. When qualified generators, regardless of the price of their bids, arbitrarily submit capacity bids to the PJM Interconnection this effectively raises and/or lowers the clearing price of wholesale electricity in the PJM Interconnection. Even though the amount of CAPs given to qualifying generators expressly relies on the electricity consumed by *retail* electricity customers within Franklin, the effects of the CAPs program interferes with FERC's jurisdiction by influencing the wholesale rates through capacity bidding. Furthermore, considering one of the main purposes of the FPA is to curb abusive practices of public utility companies by bringing them under effective control of FERC, the CAPs program should also be conflict preempted because it enables the arbitrary bidding of capacity, recklessly influencing the clearing price, and effectively influencing the price consumers have to pay for electricity at the wholesale level.

III. The State of Franklin by enacting Section 2(a) of the EDEA has violated the Dormant Commerce Clause by creating a geographic limitation on "certified biomass feedstock" that favors in-state grown biomass at expense of out-of-state biomass. The Dormant Commerce Clause prohibits states from engaging in economic protectionism as well as activities that would tend to discriminate against the flow of interstate commerce. If a state is to be allowed to discriminate against interstate commerce, it must serve legitimate local needs that are not unduly burdensome. The State of Franklin by only allowing biomass to come from forests that are in-state and not allowing out-of-state forests to compete is effectively engaging in economic protectionism and violating the Dormant Commerce clause. The Court will carefully scrutinize actions that tend to burden out-of-state producers and benefit in-state producers. Section 2(a) by focusing not only on "certified biomass feedstock" but, by setting forth a geographic limitation and other extraneous factors, such as the local unemployment in areas that may contain the "certified biomass feedstock."

IV. The State of Franklin by enacting Section 2(b) of the EDEA is discriminating against out-of-state business interests that may have had CHP facilities that are tied into the Franklin electrical grid. A State may not either try to isolate itself from interstate commerce or burden interstate commerce. The Court will decide if the Act is facially discriminatory or if as applied it would violate the Dormant Commerce Clause. The as applied test will look to see if the state has any legitimate local interests that would justify the burden on interstate commerce.

## Argument

The Supremacy Clause of the United States Constitution provides that the Constitution, federal laws, and treaties of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Federal supremacy allows the federal government to preempt state law to prevent states from interfering with constitutional, federal acts and reflects that the federal government's power is "supreme within its sphere of action." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). State laws cannot "impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id*. at 436.When state laws conflict with constitutional federal laws, the federal law preempts the state law, and the state law is void. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress preempts state laws when it either: (1) explicitly preempts state law in a statute, (2) "evidences an intent to occupy a given field" (field preemption), or (3) conflicts in a way that makes it "impossible to comply with both state and federal law" or realize the "full purposes and objectives of Congress" (conflict preemption). *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (citing *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 248 (1984)). Preemption challenges typically turn on Congressional intent. *Rice* v. *Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). The EDEA is field and conflict preempted, and unconstitutional under the Supremacy Clause.

### I. Section 1 of EDEA is "field preempted" under the Supremacy Clause since FERC has exclusive jurisdiction under the Federal Power Act with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce.

Congress enacted the FPA, 16 U.S.C. § 792 *et seq.* (16 U.S.C. § 824 *et seq.*, *as amended*), to create a comprehensive scheme to regulate power and grant federal regulators authority over electric energy in interstate commerce. A bright line separates retail and wholesale transactions and is reinforced by the filed rate doctrine. *FPC v Southern Cal. Edison Co.* 376 U.S. 205, 215 (1964). FERC uses jurisdictional auctions to regulate the wholesale price of electricity in the State of Franklin. Although states retain their control over retail prices, FERC has jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale" pursuant to §201(b) of the FPA. 16 U.S.C. § 824(b)(1). The FERC and FPA explicitly preempt Franklin's EDEA and demonstrate Congressional intent to occupy the wholesale, interstate energy market.

**A. Congress intended to occupy the wholesale energy field and conflicting state statutes are field preempted and unconstitutional.**

Congress gave FERC the express authority to regulate wholesale energy markets to efficiently produce electricity and benefit consumers through competitive forces. This free-market structure operates through auction market competition by electricity producers. FERC's jurisdiction over the sale of electricity in interstate commerce and wholesale pricing preempts the field. *New York v. FERC*, 535 U.S. 1, 5-7 (2002) (discussing structure and operation of the FPA).  FERC's jurisdiction over rates in connection with jurisdictional sales and service are subject to §205 of the FPA. This requires that the state rates are just, reasonable, and neither discriminatory nor preferential.16 U.S.C. §§ 824d(a), (b), (e). Under § 206, the FPA authorizes FERC to establish new rates for states that violate §205. *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *as clarified*. Congress drew "a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). FERC's has exclusive jurisdiction over wholesale electricity markets.

FERC uses its congressional authority to promote free enterprise. Since anti-competitive practices create dysfunctional markets, FERC has spurred wholesale electricity competition in wide geographic areas. *Id*. Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2601 *et seq.*, to further the development of new generating facilities. PURPA gave FERC authority to require utilities to support "qualifying cogeneration and small power production facilities." *FERC* v. *Mississippi*, 456 U.S. 742, 751 (1982); *see also* 16 U.S.C. § 824a-3(a). Section 210(b) of PURPA requires that utilities purchase electricity at the utility's "avoided cost," defined as the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or other qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101 (b)(6); *Occidental Chem. Corp. v. La. PSC*, 494 F. Supp. 2d 401, 404 (M.D. La. 2007). FERC also issued Order No. 1000, which requires public utility participation in regional transmission planning to promote cost-effective solutions. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *as clarified.* The Order allowed regional selection of transmission plans that are efficient or cost-effective. In addition to its congressional power over wholesale energy pricing, FERC advances open energy markets through its orders and regulations. Therefore, the anti-competive incentives for the coal industry violate FERC's stated objectives.

"The purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

Although states typically retain their police powers, the clear and manifest purpose of Congress can supersede the states when Congress states this purpose clearly and manifestly. *Lohr*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). In § 217(b)(4) of the FPA, Congress authorized FERC to "exercise [its authority]...in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy [their] service obligations." 16 U.S.C. § 824q(b)(4). S.C. Pub. Serv. Auth. v. FERC, 412 U.S. App. D.C. 41, 90, 762 F.3d 41, 90 (2014). This demonstrates that Congress intended to occupy the field.

Congress gives FERC broad authority to regulate wholesale rates and courts generally find that state incentives to benefit certain producers indirectly or directly affect wholesale rates. "The FPA has delegated to FERC the authority--and, indeed, the duty--to ensure that rules or practices "affecting" wholesale rates are just and reasonable.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 764 (2016) (citing §§824d(a), 824e(a)). "The 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." *Id.* at 760 (internal quotation marks omitted). In *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016), the State of Maryland enacted a state regulatory program to provide incentives to new electricity generation to supplement the incentives provided by the federal government through FERC. Maryland's program gave subsidies through state contracts to new generators. The court held that Maryland's statute unevenly rewarded new electricity generators and affected interstate rates, and therefore invaded "FERC's regulatory turf." *Id.*

Here, Franklin's EDEA disregards this congressional mandate. Much like in *Hughes*, Franklin seeks to find a different solution than provided by FERC. However, when Congress occupies the field, state cannot utilize conflicting, alternate solutions.

The State of Franklin seeks to provide financial incentives through CAPs to incentivize the sale of coal. Section 1(a)(6) of the EDEA defines electric generating plants as those "located within the Franklin East, Vandalia South, or Allegheny North zones within the PJM operating region." R. at 6. The second and third plant locations in the statute are separate states from Franklin, thereby implicating FERC's exclusive jurisdiction over interstate wholesale pricing.

Since FERC occupies the entire wholesale interstate field and the Act interferes with FERC's market forces and exclusive authority to regulate, the EDEA is field preempted.

**B. Congress expressly intended to preempt the field when it enacted the FPA.**

Field preemption can occur when Congress expressly preempts the field or implicitly intends to operate the field. Congress expressly preempts state laws contrary to federal legislation by describing its intent to do so and describing the extent of the federal preemption. *See Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 468 (2012) (holding federal statute preempted California law that attempted "to regulate the same thing, at the same time, in the same place except by imposing different requirements."). When Congress occupies a field, courts interpret the field broadly to include related state regulations as preempted by the federal statute. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). The broad power of Congress when it occupies the field can preempt state laws that are consistent with the federal objectives, because express preemption occupies the whole field and supersedes state law. *Rowe v. New Hampshire Motor Transport Assn.*, 552 U.S. 364, 367 (2008). Congressional statutes that expressly preempt the field supplant state regulation with the same subject matter even when the state legislation advances the federal interest. *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000).

The statute requires coal as the primary fuel source with 10% from Franklin. R. at 6. The Act subsidizes those plants that need it to continue operating. R. at 6. The findings and declarations made by Franklin's legislature indicate the legislative intent to support economic growth, expand employment, and ensure capacity. R. at 4. The Governor's signing statement that the EDEA will support miners further demonstrates the intent to boost Franklin's economy. R. at 5. However, state economic goals do not allow states to overcome federal preemption. *See Wyoming v. United States, 279 F.3d 1214, 1218 (10th Cir. 2002).* FERC's exclusive control over wholesale energy markets and electricity in interstate commerce, field preempts Franklin's attempt to override the FPA. In addition, Franklin's priority for coal plants prevents the full realization of FERC objectives of using natural gas and other sustainable, clean, and competitive fuels.

**C. Congress impliedly intended to preempt the field when it enacted the FPA.**

Even if this court does not find express field preemption in the regulation of interstate electricity rates, Congress also impliedly preempted the field. In *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U. S. 493, 509 (1989), the court held that state laws cannot supplant federal jurisprudence "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (brackets and internal quotation marks omitted). Under *Hughes*, this court should liberally evaluate state regulation as impliedly preempted.

**D. The use of biofuels could cause greater harm than their correlative environmental benefits and decisions concerning national energy interests are properly reserved to the federal government.**

Franklin overestimates the ability of the Act to improve electric utility grid resilience, reduce costs, and increase the ability of customers to manage their energy costs. In addition to FERC, many federal agencies and laws address national environmental concerns. Biofuels are referenced in the Clean Air Act (42 U.S.C. § 7401, *et seq.*), the Energy Policy Act of 2005 (E.P. Act, 42 U.S.C. § 15801, *et seq.*), the Renewable Fuel Standard (RFS), and the Energy Independence and Security Act of 2007 (EISA, 42 USCS § 17001, *et seq.*). The RFS started as part of the E.P. Act and the U.S. Environmental Protection Agency (EPA) administers it. Renewable Fuel Standard, U.S. Dept. of Energy, (Feb. 12, 2017), http://www. afdc.energy.gov/laws/RFS.

Congress expanded the RFS in the EISA, to require that "transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories)" include a minimum 36 billion gallons per year in 2022. The RFS mandate increased the use of ethanol from corn and will increase the use of ethanol from prairie grass, corn stalks, or algae in the future. *Id*. However, the analysis of environmental benefits from sustainable biofuels must include the lifecycle of greenhouse gas emissions from the creation and use of the biofuels and the increased price for land, water, and food as these resources are used for biofuel production.

State legislation that interferes with international treaty obligations is preempted in the supremacy clause. U.S. Const. art. VI, cl. 2. The cost of natural gas versus coal does not support the use of coal when cleaner options are available. James Van Nostrand, Why the U.S. Coal Industry and Its Jobs Are Not Coming Back, Yale Environment 360, Dec. 1, 2016, http://e360.yale.edu/features/why_us_coal_industry_and_its_jobs_are_not_coming_back. The economics particularly do not make sense when countries around the world have stated that they will not purchase coal due to its environmental impact and are making plans to reduce the use of coal within their borders. *Id*.

**II. Section 1 of the EDEA, as enacted by the State of Franklin and administered by Franklin PSC, is "conflict preempted" under the Supremacy Clause of the U.S. Constitution given that FERC has sole jurisdiction on market-based wholesale rates of electricity and the CAPs program enacted by Section 1 of the EDEA inherently affects market-based wholesale rates.**

In evaluating whether a State law is preempted by a Federal statute or regulation, courts typically start with the assumption that State laws are not superseded by a Federal action unless it is the clear purpose of Congress. *Rice v. Santa Fe Elevator* Corp., 331 U.S. 218, 230 (1947). A court's inquiry into the scope of a federal statute's preemptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every preemption case. U.S. Const. art. 6, cl. 2. If Congress expresses its purpose in enacting a given program, state laws or regulations contradicting that federal enactment, conflicting with its accomplishment, or frustrating its purposes, are preempted and void. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). Such conflicts give rise to preemption when: (1) compliance with both federal and state regulations is a physical impossibility *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990), or (2) state law is found to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 98 (1992). The State of Franklin's Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives that the FPA delegated to FERC.

Congress enacted the Federal Power Act (FPA) in 1935 which established federal regulation over most wholesale interstate sales, transportation of natural gas and electric power, and delegated authority to implement these regulations to the Federal Power Commission (now known as the Federal Energy Regulatory Commission or FERC). The purpose of this Act was two-fold: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation to the expanding business of transmitting and selling electric power in interstate commerce. *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). Furthermore, the statute requires that rates be just, reasonable, and nondiscriminatory. 16 U.S.C. § 824d (a) (2015).

**A. The CAPs program violates FERC's exclusive jurisdiction establishing wholesale interstate rates and ensuring the methods in doing so are just, reasonable and nondiscriminatory.**

FERC's exclusive jurisdiction over wholesale interstate rate-making created two doctrines known as the "filed rate doctrine" and the "Narragansett doctrine". The "filed rate doctrine" requires that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates; when the filed rate doctrine applies to state regulators, it does so as a matter of federal preemption through the Supremacy Clause. U.S. Const. art. 6, cl. 2; Federal Power Act, § 201(b), as amended, 16 U.S.C. § 824(b) (2015). Furthermore, the Narragansett doctrine provides that states lack the authority to question the reasonableness of the FERC approved wholesale rates. These two doctrines together ensure that courts and states respect the reasonableness of interstate wholesale utility rates approved by FERC and as against the preference of both reviewing courts and state agencies. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 422 n.28 (1986).

One way FERC structures its electricity market is through a FERC-approved auction process. *Id.* Regional Transmission Organizations (RTOs) can buy from and sell to generators and LSEs. The RTOs then transmit the energy sold by generators to LSEs, but also run several markets under the supervision of FERC, including a same-day auction, a next-day auction, and a capacity auction. *Energy Primer: A Handbook of Energy Market Basics,* THE DIVISION OF ENERGY MARKET OVERSIGHT OFFICE OF ENFORCEMENT | FEDERAL ENERGY REGULATORY COMMISSION, 57-63 (2015) https://www.ferc.gov/ market-oversight/ guide/energy- primer.pdf. The "capacity auction" is designed to ensure enough generation is available to meet future power demands. *Id.* The RTOs determine how much capacity will be needed in three years' time, then generators, and utilities that have acquired capacity from generators under bilateral contracts, commit to sell (and the RTOs commit to purchase) the amount of capacity selected in the auction for resale to the LSE in three years' time. *Id.* RTOs or ISO's then accept bids until they have purchased enough capacity to satisfy anticipated demand. *Hughes,* 136 S. Ct. at 1290. All accepted capacity sellers receive the highest accepted rate, called the "clearing price." *Id.* The State of Franklin uses this method to conduct business. R. at 5.

Although the FPA inherently left states with the authority to set retail rates, this power was limited in *Nantahala Power & Light Co. v. Thornburg* 476 U.S. 953 (1986). In *Nantahala,* the state commission, exercising its retail rate-making authority, allocated entitlements to low-cost hydroelectric power among retail customers in a manner inconsistent with the apportionment of those entitlements pursuant to agreements approved by FERC. *Id.* at 955-56. The state supreme court rejected the utility's position that the state action amounted to a disallowance of wholesale costs and that it did not impermissibly intrude into FERC's domain. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 687 (1985). The state supreme court further interpreted the Narragansett doctrine to permit states to determine which costs should be passed through to retail consumers in rate increases. *Id*. The U.S. Supreme

Court reversed the state's efforts to reallocate the utilities costs of power stating that *Narragansett* decisions "are properly driven by the need to enforce the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates…." *Nantahala,* at 966 (interpreting *Narragansett Elec. Co. v. Burke*, 119 R.I. 559 (1977)). Once FERC sets the wholesale rate, a state may not conclude that FERC-approved wholesale rates are unreasonable when setting retail rates. *Id*.

States can also interfere with FERC authority even when the state exercises their traditional authority over retail rates or in-state generation by disregarding interstate wholesale rates deemed just and reasonable by FERC. *Hughes,* 136 S. Ct. at 1299. In *Hughes*, FERC exercised its authority under § 824d(a) of the FPA to set "rates and charges…received…for or in connection with" interstate wholesale sales. *Id.* at 1297. FERC approved the PJM Interconnection capacity auction as the sole rate-setting mechanism for sales of capacity within the PJM Interconnection, deeming the clearing price *per se* just and reasonable. *Id.* The State of Maryland believed this market-based program provided insufficient incentives for new electricity generation within the State and therefore enacted its own regulatory program that provided subsidies, through state-mandated contracts referred to as a "contract for differences" in order to establish a new generating plant. *Id.* at 1292. Each contract of difference required that, LSEs enter into a 20-year pricing contract with CPV at a rate CPV specified in its proposal. *Id.* at 1290. Under the terms of the contract, CPV would sell its capacity to PJM through the auction, but through mandated payments from or to LSEs, would receive the contract price rather than the clearing price for these sales to PJM. *Id.* While Maryland's program did not prevent the utility from recovering costs through retail sales that FERC mandated it incur—Maryland instead guaranteed the generators a certain rate for capacity sales regardless of the clearing price established by the PJM. *Id.* at 1298-99. Since Maryland's program completely disregarded the just and reasonable clearing price set by the PJM auction the court determined the program was preempted. *Id.* at 1294 and 99.

Although the CAPs program for the State of Franklin does not fully resemble Maryland's "contract of differences," the effect on FERC's jurisdiction is just the same. Because CAPs eligibility hinges on the condition that qualified generators must offer capacity to the PJM Interconnection, the CAPs program indirectly affects wholesale market signals and thus influences the clearing price of the PJM and its sub-markets. Capacity bids largely influence the wholesale market clearing price.

> "For instance, a generation owner with a portfolio of assets might be able increase market prices by submitting a high bid for one unit. Even if the unit doesn't run, the strategy could raise prices by causing another high-cost unit to set the market price. Despite the lost revenue from one plant, it is possible for the increased revenue from other plants to result in higher profits."

Collin Cain, M.Se. & Jonathan Lesser, Ph.D., *A Common Sense Guide to Wholesale Electric Markets*. BATES WHITE ECONOMIC CONSULTING. 15 (April, 2007), http://www.bateswhite.com/media/publication/55_media.741.pdf. Regardless of the price of their bids, when qualified generators arbitrarily submit capacity bids to the PJM Interconnection this effectively raises and/or lowers the clearing price of wholesale electricity in the PJM Interconnection. Even though the State has full authority to calculate the amount of CAPs given to qualifying generators based on *retail* electricity sold to customers within Franklin R. at 7, the effects of the CAPs program interferes with FERC's jurisdiction by influencing the wholesale rates through capacity bidding and thus violates the filed rate doctrine and is therefore conflict preempted.

**B. The CAPs program violates the purpose of the FPA in curbing abusive practices of**

**public utility companies by bringing them under effective control of FERC.**

In order for a qualifying generator to obtain CAPs benefits, their eligibility hinges on the condition that they must offer capacity to the PJM Interconnection. By doing this, the program directly affects wholesale market signals of capacity, affecting the clearing prices of the PJM and its sub-markets which influences the price consumers have to pay and the amount of capacity generators who are not within the program have to provide. Having to place capacity bids on the PJM as a condition precedent to receiving CAPs, coupled with the guarantee that costs will be recovered after placing a bid increases the likelihood that qualified generators will place bids carelessly by completely disregarding their bid price. When qualifying generators can carelessly place capacity bids on the market, the bids placed will ultimately increase or decrease the wholesale market's clearing price depending on how high or low the bids are. The reason FPA delegated exclusive jurisdiction to FERC in regards to wholesale interstate rate-making was to curb abusive practices of public utility companies. By enticing qualified generators to bid carelessly on the PJM Interconnection, the CAPs program runs counter to the objective set by the FPA and should therefore be conflict preempted.

**C. The CAPs program violates the objective of the EDEA in incentivizing the development of new electric generating facilities.**

CAPs defeats EDEA's own objective incentivizing the development of new electric generating facilities by impacting the clearing prices within the Franklin East, Vandalia South, and Allegheny North LMP zones. LMP zones are "sub-markets" within the PJM region that reflect the relative generation supply and demand within a particular geographic area, given transmission constraints. R. at 5-6. When the transmission system is chronically congested in a particular location, LMPs provide consumers and suppliers with important price signals which serve to induce investment in, among other things, new generation supplies. Cain & Lesser, at 21. *Hughes* furthers this rationale stating that capacity auctions serve to identify a need for new generation. *Hughes*, 136 S. Ct. at 1293. High clearing prices in a capacity auction encourage new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence. *Id.* On the other hand, low clearing prices act to the contrary by discouraging new entry and encouraging retirement of existing high-cost generators. *Id.* Because the CAPs program increases the likelihood that qualified generators will submit bids at the wholesale interstate level at arbitrary prices, and because the prices will be further skewed as more and more generators within the state face financial distress with the possibility of premature retirement, the signals used by investors for investing purposes within the given LMP zones will be misrepresented and will likely lead to investors making misinformed investment decisions.

Considering FERC's regulation power under the FPA includes regulating rates of wholesale interstate sales, and also considering one of the main purposes of the FPA is to curb abusive practices of public utility companies by bringing them under the effective control of FERC, the CAPs program should be conflict preempted because it enables the arbitrary bidding of capacity which recklessly influences the price consumers have to pay for electricity and the amount of capacity that generators will have to produce at the wholesale level.

**III. The state of Franklin's enactment and administration of Section 2(a) of the EDEA is invalid under the Dormant Commerce Clause of the United States Constitution because it limits eligible biomass feedstock to areas in the State of Franklin.**

A "central concern" of the founding fathers at the constitutional convention was the creation of state-level barriers that were impeding commerce among states. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). Section 2(a) of the EDEA fundamentally affects the way RPS's operate by confining "eligible biomass feedstock" to only biomass that was grown in Franklin. State laws that discriminate against out of state actors are "virtually per se invalid." *Oregon Waste Sys., Inc. v. Oregon Dep't of Envt'l. Quality*, 511 U.S. 93, 99 (1994). The presumption of *per se* invalidity makes it extremely hard for a state to unduly burden out-of-state competition thereby favoring in-state competition. *See City of Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978). In *City of Philadelphia*, the Supreme Court overturned a New Jersey law attempting to ban New Jersey from importing garbage. The Court stated that "unless there was a reason apart from their origin, to treat them differently," a state could not burden interstate commerce. *Id.* at 626–27. The court has always disfavored pure economic protectionism. *C.f. Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that the commerce clause allowed the Congress the authority to regulate the means of commerce, but that the Commerce Clause also was enacted to prevent the "disunity" that had resulted from states competing against each other). The issue is not whether the act is facially discriminatory; rather, the issue is whether the effect will be "excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

**A. The Geographical Limitation called for in Section 2(a) of the EDEA, by authorizing the State of Franklin to give preferences to in-state forests are a violation of the Dormant Commerce Clause because it only allows biomass grown in-state forests to be eligible.**

The Dormant Commerce Clause has two commands. The two commands are (1) that a state must not discriminate against interstate commerce by favoring intrastate commerce and (2) a state may not burden interstate commerce. *Philadelphia*, 437 U.S. at 636. The *Philadelphia* Court put forth one of the best articulations of the Dormant Commerce Clause's commands by by setting forth the *per se* invalidity test. *Id.* A different test was used for laws that were not facially discriminatory, but that may still burden interstate commerce in effect. *Pike*, 397 U.S. at 142. *Pike* involved determining whether a law directed at legitimate local concerns, that created an incidental effect on interstate commerce, could survive strict scrutiny. This has come to be known as the *Pike* test. *Philadelphia* made it clear that laws that affect interstate commerce will still receive the *per se* invalidity test. As the court explained,

> Since the evil of protectionism can reside in legislative means as well as legislative ends, it is immaterial whether the legislative purpose . . . is to protect New Jersey's environment or its economy, for whatever the purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

*Philadelphia* at 636 The test makes it quite clear the Supreme Court will carefully examine a challenged law affecting interstate commerce to determine if it is in fact incidental and serves a legitimate local purpose.

As explained above there are two main tests – the *per se* rule of invalidity and the *Pike* balancing test – that the Supreme Court uses when inquiring whether a law may violate the Dormant Commerce Clause. The *per se* test is the simplest of the two because it only mandates that a law or regulations cannot be upheld if simple economic protectionism is affected. *Id.* at 624. The *Pike* test, by contrast, is one in which the Court will allow a state to even-handedly regulate conduct in furtherance of a "legitimate local interest" in a way that only incidentally affects interstate commerce. *Pike* at 636. While this test, may give the states more leeway to burden interstate commerce, the Court maintains a very narrow view of what will be allowed.

The Court has always been suspicious of state or local regulations placing a definite geographical limitation on commerce activities. *See, e.g.*, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (overturning an Ohio law that gave in-state manufacturers of ethanol a subsidy, but limiting out of state manufacturers to those whose states offered reciprocity with Ohio). In *Dean Milk Co. v. City of Madison, Wis*., the Court overturned a city ordinance requiring all milk and milk products sold in Madison, Wisconsin to be processed and bottled at an approved plant within five miles of the city. 340 U.S. 349 (1951). The Court reasoned that the city could not, "even in the exercise of its unquestioned power to protect the health and safety of its people" discriminate against interstate commerce as there were reasonable nondiscriminatory alternatives available. *Id.* at 354.

Applying these precedents to Section 2(a) of the EDEA, it is apparent that there are two purposes underlying the Act. The State of Franklin's interest was to take advantage of its status as the third most densely forested state in the nation. In *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977), the Court stated that a state may enjoy, even from the result of a government agency, "competitive and economic advantages" derived from regulation. In *Hunt* the Washington Apple Commission challenged regulations enacted by North Carolina that forbade the Washington Apple Commission from placings its unique state grade mark on closed containers that would end up in North Carolina. *Hunt* at 351. The Court held that North Carolina's action was blatant protectionism and that it could not favor in-state grown apples by forcing a change in packaging. *Id.* at 353. While the holding is paramount in analyzing what is acceptable under the Dormant Commerce Clause, *Hunt* is also important because the Court recognized, possibly in dicta, that some states will have natural advantages or – in the alternative – may create advantages that will benefit in-state entities if the state does not discriminate against out-of-state entities. The Franklin PSC has squarely violated the Dormant Commerce Clause by following the EDEA and only allowing "certified biomass feedstock" to come from either Franklin or an adjoining state. A Dormant Commerce Clause analysis of this regulation tends to benefit Franklin, while discriminating against the general flow of interstate commerce. Further, by specifically focusing on the unemployment rates of the areas where the "Designated Biomass Growing Region(s)" will be located implicates the motivations of the State as it forces the Franklin PSC along with the DNR to focus on state level factors that will not satisfy the *Pike* test. *Pike* states statutes that regulate "even-handedly" to effectuate a legitimate local public interest, and the effects on interstate commerce are only incidental, the regulation will be upheld. *Id* at 142. Applying this standard, it is clear the rule is not *per se* invalid because it does not facially discriminate against out of state interests. The benefits of the regulation, though crouched in the terms of environmentalism and environmental protection, do not survive the exacting standards of the *Pike* test.

**B. The percentage and preference requirement for "certified biomass feedstock" coming exclusively from the State of Franklin as set forth in Section 2(a) of the statute violates the Dormant Commerce Clause, because it excludes out of state growers of biomass from participating in the program.**

The Supreme Court has taken a dim view of state actions that reek of economic protectionism. That is, it will strike down statutes and other regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *New Energy Co. of Indiana v. Limabach,* 486 U.S. 269, 273–74 (1988) (Holding that the reciprocity requirement for ethanol tax credits to be awarded to out of state companies could not be contingent on their states granting of reciprocity with Ohio). Further, the Court will look at taxes that have an effect of burdening out of state producers using the same analysis as was seen in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (holding that the state action had a discriminatory purpose) or in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that the state action had a discriminatory effect). The resulting rule is that the court will strike down statutes constituting economic protectionism by looking at their purpose and effects, with the caveat that it may be required to use a balancing test between local benefits and the burden on interstate commerce that was set down in *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

Even the *Pike* test does not allow a wholesale interference with interstate commerce; instead, the court must merely decide that the local benefits outweigh the interference with interstate commerce. The only Supreme Court case holding that a facially discriminatory law with substantial local benefits, and whose benefits outweighed the effect on interstate commerce, was the decision in *Maine v. Taylor,* 477 U.S. 131 (1986). In *Maine,* the court upheld a statute prohibiting the importation of baitfish into Maine. The Court recognized in *Maine* that the statute was discriminatory, but the local interests were so compelling (namely that parasites and non-native species) and would pose such an environmental and ecological harm that the statute would pass scrutiny. The final case that helps illustrate how the Court will look at state preferences and percentages is *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). This case helps to show how the Supreme Court will look at a state trying to favor its own in state industry (Oklahoma) and how the court will look at the underlying history in the legislature to see whether there was a violation of the Dormant Commerce Clause. In *Wyoming*, the Oklahoma legislature passed a precatory resolution asking in-state electricity generators using coal to use ten percent of locally generated coal. *Id.* at 443. Trying to force more compliance with the act, the state passed a mandatory statute mandating the ten percent requirement. *Id.* at 444. Unusually, the state of Wyoming brought the action under the Supreme Court's original jurisdiction. *Id.* at 438. The court ultimately held, using the precedents established through other cases, that Oklahoma's requirement was on discriminatory on both its face and in effect. *Id* at 454. This ruling did not necessitate applying the *Pike test.*

Applying these rules, Section 2(a) will not survive any test under the Dormant Commerce Clause. Simply looking at the *per se* invalidity test as was best articulated in *City of Philadelphia*, it is clear the *per se* invalidity requires a look at both the purpose and effect that statutes will have on interstate commerce. *Philadelphia*, 437 U.S. at 626. As the Court stated, "the evils of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626. The actions of the PSC and the operation of the EDEA necessitates a look at the findings of the Franklin state legislature. Out of the nine findings made, none are on their face discriminatory, and as such a look at the effect the act will have on interstate commerce is necessary to see if it can survive the *per se* test. The act, by creating a preference for in-state grown biomass and creating a certain percentage would affect interstate commerce. Further, by using existing precedents in *Wyoming* as well *New Energy*, a state that is favoring its own industries by either granting preferential taxes or by requiring a specific percentage of an in-state resource will violate the Dormant Commerce Clause.

As the Dormant Commerce Clause is a prohibition on state efforts burdening interstate commerce by discriminating against other states, the geographic and percentage requirements contained in Section 2(a) of the EDEA cannot survive under any exemption of test the Supreme Court has articulated.

**IV. The State of Franklin's Enactment and Administration of Section 2(b) of the EDEA is invalid under the Dormant Commerce Clause of the United States Constitution as it limits eligible facilities to those that serve retail electricity customers in the State of Franklin.**

While the Constitution contains no explicit terms restricting a state from either benefiting its own in-state interests or restricting out-of-state interests, the Supreme Court has, since the earliest days of the nation, sensed a negative implication in the provision. *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273,74 (1988). The court has recently clarified that the purpose of the Constituton was to prevent the proliferation of state-level barriers impeding commerce. *Granholm v Heald,* 544 U.S. 460,472 (2005). Further, the Supreme Court has stated that laws that do not discriminate on their face against interstate commerce may similarly be held to be invalid. *Pike v. Bruce Church, Inc.,* 397 U.S. 137,142 (1970). The *Pike* decision articulated a test that it is unconstitutional for a state to place a burden on interstate commerce that is "excessive in relation to the putative local benefits." *Id* at 142.

There of course exists exemptions for the Dormant Commerce Clause, as it is a court inferred doctrine. These allow states to discriminate against interstate commerce, either facially or as applied. Congress possesses the power to allow the states to enact laws that may discriminate against other states. *See Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946) (recognizing that Congress had allowed the states to regulate insurance, even in ways that would be discriminatory to out-of-state companies). The more relevant exemption to the Dormant Commerce Clause is called the "market-participant" exemption and it allows state entities that are in the market for goods or services to operate in a discriminatory fashion. *United haulers Ass'n, Inc., v. Oneide-Herkimer Solid Wast Mgmt. Authority.,* 550 U.S. 330,343 (2007). *See also Hughes v. Alexandra Scrap Corp.,* 426 U.S. 794 (1976) (first recognizing that the market participant exemption exists and that states do not face the same Dormant Commerce Clause restrictions as they would if they were not in the market).

**A. The Geographical limitation called for in Section 2(b) of the EDEA, by authorizing the State of Franklin, to give preferences to "eligible facilities" that will solely serve customers within Franklin is a violation of the Dormant Commerce Clause because it benefits in-state**

**facilities but not out-of-of state facilities that are connected to the grid that serve customers within Franklin.**

The Supreme Court abhors state regulations that discriminate between in-state and out of state economic interest. *Hughes v. Oklahoma*, 441 U.S. 323,336 (1979). Discrimination as the Court has held is the "differential treatment" of in-state and out of state economic interests that burdens out of state interests and benefits in-state interests. *Chemical Waste Management Inc. v. Hunt,* 504 U.S. 334,344 (1992). If such discrimination is present it is *per se* invalid. *Id* at 344. Nondiscriminatory regulations that only have an incidental burden on interstate are valid. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). But, as the court in *Pike* articulated, such burdens will be invalid if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* at 142. *Pike* set forth a test to analyze if a burden on interstate commerce that was enacted by a state or locality could pass muster under the Dormant Commerce Clause. *Id.* at 142,43. The case concerned an Arizona law that required that all cantaloupes grown in Arizona must be packed in a container in state. *Id.* at 138. The grower, Bruce Church Inc. grew cantaloupes on the Arizona, California border. The grower had a packing facility that was located in California and it would be more economical for them to transport their produce to California than to expend resources to build a packing facility in Arizona. The Court held that while the Arizona statute had purported to regulate the wholesomeness and quality as well as to protect the reputation of Arizona growers and could survive constitutional challenges under the Dormant Commerce Clause. *Id.* at 142,43. The state could not burden interstate commerce in such a way that did not offer any benefit or protect a legitimate interest of the state. *Id.* at145. The court also further articulated that it has and will view with "particular suspicion" state statutes and regulations that require business operations to be performed in state. *Id* at 145. The effect of this court ruling is that requirements that states place on businesses or economic activities to be undertaken in a specified state that does not have a legitimate local interest are counter to the Dormant Commerce Clause.

A state may legitimately regulate business interests in a way that does not run afoul of the Dormant Commerce Clause, but they must do so in an evenhanded way that does not discriminate against out of state interests. *See generally City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) *Fort Gratiot Sanitary landfill, Inc. v. Michigan Dept. of Natural Resources,* 504 U.S. 353 (1992) *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, 511 U.S. 93 (1994).* In this trilogy of cases, the Court grappled with what was appropriate when a state tried to regulate for health and welfare and what the Dormant Commerce Clause required. In *Philadelphia* the court held that an outright ban on trash from out of state interests would amount to "economic isolation" and this could not be allowed. *Philadelphia* at 623,24. The court further clarified that a state may not discriminate against interstate commerce by allowing its counties, under the guise of health and safety regulations to isolate itself from the national economy. *Gratiot* at 363,64. Finally, in *Oregon Waste Systems*, the court overturned an Oregon statute that they characterized as facially discriminatory that mandated a surcharge on waste that was generated out of state. *Oregon Waste Systems* at 100,101. These cases make clear that treating out of state interests as well as favoring in-state interests that do not serve legitimate local interests cannot stand.

Applying these precedents, we can see that section 2(b) of the EDEA by applying to sites that are entirely within the State of Franklin and on the customer side violates the Dormant Commerce Clause discriminates against out of state cogeneration facilities that may sell electricity in Franklin. *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269 (1988) explained that "economic protectionism" that is in the form of "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" *New Energy* at 273. While calling a benefit that a state extends to an in-state interest "economic protectionism" may sound harsh, we must keep in mind the cases of *City of Philadelphia, Fort Gratiot,* and *Oregon Waste Systems* that require that a state must truly have a compelling reason for burdening interstate commerce. Further, looking at *Granholm v. Heald,* 544 U.S. 460 (2005) and *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984) the Court does not allow for states to either give a competitive advantage (*Bacchus)* or discriminate against out of state producers (*Granholm).* In *Granholm,* Michigan and New York, respectively had statutes and regulations that effectively prevented out of state wineries from shipping to consumers in those states, while allowing in-state wineries to do so. The Court, relying on *Oregon Waste Sys, Inc. v. Dept. of Envtl. Quality of Ore.,* 511 U.S. 93 (1994) that "differential treatment of in-state and out-of-state economic interests" violate the commerce clause struck down both statutes. *Granholm v. Heald*, 544 U.S. 460,72. (2005).

These decisions make clear that favoring in-state economic interests are only acceptable if the state has a legitimate local purpose for burdening interstate commerce. *Id* at 474,75. Further, the Court's jurisprudence on these matters clearly do not allow the State of Franklin to discriminate against out-of- state actors.

## **Conclusion**

For the foregoing reasons, Appellee respectfully requests that the Court affirm the district court's grant of EPC's motion for summary judgment on all counts.