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

**TWELFTH CIRCUIT**

| | | |
|---|---|---|
| The State of Franklin,<br>Appellant | ) | |
| v. | ) | Case No. 16-01234 |
| Electricity Producers Coalition,<br>Appellee | ) | Brief for Appellee |

Appellee Team #16

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

## JURISDICTION

The U.S. District Court for the Eastern District of Franklin and the U.S. Court of Appeals for the Twelfth Circuit properly exercised subject matter jurisdiction because the case raised a federal question arising under the laws of the United States. 28. U.S.C. §1331.

## STATEMENT OF ISSUES PRESENTED

1. Under federal law and the United States Constitution, does Franklin's Energy Diversification and Expansion Act violate the Supremacy Clause of the United States Constitution when it infringes with the exclusive jurisdiction of the Federal Energy Regulatory Commission?
2. Under federal law and the United States Constitution, does Franklin's Energy Diversification and Expansion Act violate the Supremacy Clause of the United States Constitution when it conflicts with the regulation of the Federal Energy Regulatory Commission?
3. Under federal law and the United States Constitution, does Franklin's Energy Diversification and Expansion Act violate the dormant Commerce Clause when it favors in-state certified biomass feedstock and disfavors out-of-state certified biomass feedstock?
4. Under federal law and the United States Constitution, does Franklin's Energy Diversification and Expansion Act violate the dormant Commerce Clause when it favors in-state energy producing facilities and disfavors out-of-state energy producing facilities?

## STATEMENT OF THE CASE

The U.S. District Court for the Eastern District of Franklin found that the Energy Diversification and Expansion Act ("Act") as implemented by Franklin's Public Service Commission ("PSC") and other Franklin agencies is unconstitutional under the Supremacy Clause and dormant Commerce Clause of the United States Constitution. (R. at 1.) The State of Franklin ("Franklin") has appealed to the U.S. Court of Appeals for the Twelfth Circuit arguing

that the District Court erred in granting declaratory and injunctive relief to the Electricity Producers Coalition. *Id.*

## STATEMENT OF THE FACTS

In early 2016, Franklin enacted the Act. (R. at 3.) The goal of Act was to preserve the economic viability of the existing coal-fired generating plants and to stimulate the development of a biomass industry because, at the time, Franklin derived most of its electricity from coal and was one of the most forested states in America. *Id*.

The pertinent sections of the Act include Section 1, Section 2(a), and Section 2(b). (R. at 3-4.) Section 1 provides for Carbon Assistance Payments ("CAPs") to eligible coal-fired generating plants in Franklin as determined by Franklin's own PSC. (R. at 3.) The PSC unilaterally determines which coal-fired generating plants will receive the payments based on just three requirements; the plant must be located within three zones in the PJM operating region, the plant relies on at least ten percent (10%) of its coal that originated from the state of Franklin, and the PSC determines that the plant needs financial assistance. (R. at 6.) In making its decision, the PSC considers the incremental capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity, the extent to which other revenues from plants are insufficient to allow plants to continue operating, the impact of the payments on ratepayers, and the public interest. (R. at 6-7.)

Section 1 of the Act requires that coal-fired generating plants that are eligible for CAPs be offered a fixed ten-year contract to receive the CAPs. (R. at 7.) The revenues necessary for funding the CAP program would be collected from all electric distribution utilities in Franklin by setting rates that, in Franklin's determination, would allow the utility to recover the cost of its CAP assessment from their retail sales. *Id.*

The PSC made the decision that five coal-fired generating plants met the requirements under the Act, four of which are located within the state of Franklin. *Id.* The CAP program was set to commence as of September 1, 2016. *Id.*

Under Section 2(a) of the Act, coal-fired generating plants in Franklin must work to be a co-fired generating plant that uses at minimum fifteen percent certified biomass feedstock. Certified biomass feedstock can only be obtained from designated biomass growing regions that the Franklin Department of Natural Resources ("DNR") and Franklin Division of Commerce ("FDC"). (R. at 9.) The Act gave factors for the DNR and FDC to consider when selecting which areas of forest would be selected as a designated biomass feedstock growing region. Two major factors include the long-term sustainability of using biomass feedstock from that area of forest and the economic outlook of the areas surrounding the potential forest areas. *Id.*

The DNR and FDC selected two designated biomass feedstock growing regions, Franklin-Allegheny State Forest and Central Appalachian Forest. (R. at 9.) All the acres of the Central Appalachian Forest are entirely within Franklin. Over two-thirds of the acres of the Franklin-Allegheny State Forest are within Franklin, while the rest are located on land in a neighboring state. *Id*. The counties that these two forests cover are all economically depressed because of the downturn in the coal industry. *Id*.

Section 2(b) of the Act modifies the existing Renewable Portfolio Standard ("RPS") to include a carve-out for customer-sited combined heat and power (CHP) fueled with biomass feedstock. (R. at 3.) This carve-out allows eligible CHP facilities to forgo the requirement to use 15 percent of its fuel from certified biomass feedstock. (R. at 10.) Because of the definition under the section, CHP facilities can only be located exclusively within the state of Franklin. *Id*.

## SUMMARY OF THE ARGUMENT

Respondent, Electricity Producers Coalition ("EPC") responds to Franklin's appeal from the Federal District Court for the Eastern District of Franklin finding that Section 1 of the Act is invalid under the Supremacy Clause, PSC's EDEA Implementation Order and the order set down by Franklin's DNR and FDC for Biomass Eligibility Determination Order are both invalid under the Commerce Clause of the U.S. Constitution. First, EPC argues that the Eastern District Court of Franklin was correct in finding that Section 1 of the Act is field preempted under the Supremacy Clause of the U.S. Constitution because the CAP program attempts to regulate an area in which Congress has exclusive authority. Second, EPC argues that the Eastern District Court of Franklin was correct in finding that Section 1 of the Act is conflict preempted under the Supremacy Clause of the U.S. Constitution because Section 1 of the Act is in direct conflict with FERC's regulation of the PJM Market. Third, EPC argues that the Eastern District Court of Franklin was correct in finding that Section 2(a) of Act is invalid under the dormant Commerce Clause of the U.S. Constitution because the designation of certified biomass feedstock favors in-state biomass industry while discriminating against out-of-state biomass industry. Fourth, EPC argues that the Eastern District Court of Franklin was correct in finding that the geographic limitation of eligible facilities under the Act is invalid under the dormant Commerce Clause of the U.S. Constitution because it favors in-state energy producers by not allowing out-of-state energy producers to be considered an eligible facility.

The standard of review in this case is *clear error* for questions of fact. *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 249-50 (3d Cir. 2014). This Court should give deference to the findings of the lower court. *Id.*

ARGUMENT

The laws of the United States are the supreme law of the land under the United States Constitution. U.S. Const. amend. VI, § 2. This constitutional provision means that a state law is preempted if it interferes with federal regulation. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). A state law can be preempted by federal law through either "field preemption" or "conflict preemption." *Solomon*, 766 F.3d at 250; *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014). Under field preemption, state law must yield to federal law in a field that Congress has determined the federal interest to be strong enough to warrant exclusive federal regulation. *Arizona v. United States*, 132 S.Ct. 2492, 2495 (2012). Under conflict preemption, state laws are preempted when they conflict with a federal law, even if the law merely stands as an obstacle to the full purposes and objectives of Congress. *Id.*

The dormant Commerce Clause prohibits states from creating regulations that unduly burden out-of-state commerce. See *C & A Carbone v. Clarkstown*, 511 U.S. 383 (1994). Under the dormant Commerce Clause, a state cannot enact a statute that prevents an out-of-state good to be sold in that state if there are less restrictive means available to meet the compelling governmental interest. See *Hughes v. Oklahoma,* 441 U.S. 322 *(*1979*)*.

A state that enacts a statute that burdens out-of-state commerce must satisfy a strict scrutiny review of the law by showing a compelling governmental interest and that the law is narrowly tailored to achieve that interest. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). States are forbidden from creating an economic barrier that is meant to benefit a local economy because there must be a national free flow of commerce. *Id*.

The EPC will show that the Act is field preempted under the Supremacy Clause of the United States Constitution and that the state of Franklin's Act is conflict preempted under the

Supremacy Clause of the United States Constitution. Because Franklin cannot show that the Act is narrowly tailored to revitalizing the energy industry in Franklin to support erecting an economic barrier against out-of-state commerce, Sections 2(a) and Sections 2(b) must be invalid under the dormant Commerce Clause.

## I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION BECAUSE THE STATE OF FRANKLIN FAILED TO SHOW THAT ITS REGULATION IN THE ENERGY DIVERSIFICATION AND EXPANSION ACT WAS NOT FIELD PREEMPTED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

### A. Franklin's Energy Diversification and Expansion Act is Field Preempted Under the Supremacy Clause of the United States Constitution Because the Federal Energy Regulatory Commission has a Strong Federal Interest in Regulating Interstate Energy Markets with Exclusive Jurisdiction Under the Federal Power Act.

The United States Constitution and the laws made by the United States in furtherance of the Constitution are the supreme law of the land and judges are bound by them. U.S. Const. amend. VI, § 2. In this system, federal law is supreme to and commands primacy over state law. *Solomon*, 766 F.3d at 250. A state law is specifically field preempted if it infringes on a field reserved for regulation by the federal government. *Hines*, 312 U.S. at 63.

States cannot interfere with fields set out for regulation by the federal government. *Hines*, 312 U.S. at 66. In *Hines*, the state government set out a regulation for aliens living in the state. *Id.* at 61. The federal government also had a regulation in place for aliens living in the United States. *Id.* at 60-61. Because the federal government, in its superior authority, had enacted a complete scheme of regulation, the Court held that the state could not "conflict or interfere with, curtail or complement" the federal law with additional regulations. *Id.* at 66-67.

In this case, the Act is field preempted by FERC's regulation. This case is analogous to *Hines* because like in *Hines*, the state is regulating in an area explicitly set aside for regulation by the federal government. In *Hines*, the state regulation infringed on commerce with foreign nations. *Hines*, 312 U.S. at 61. In this case, the state regulation infringes on commerce among the states. The PJM Interconnection operates its market in accordance with tariffs approved by FERC, a federal commission. (R. at 11.) Therefore, the PJM Interconnection is regulating interstate commerce. Because the Court in *Hines* held that Pennsylvania's regulations were field preempted due to the strong federal interest in alien registration, this Court should also find that Franklin's regulations are field preempted due to the strong federal interest in regulating interstate energy.

Due to the strong federal interest the federal government has in regulating interstate commerce, Franklin's Act was field preempted by FERC's regulation.

B. Franklin's Energy Diversification and Expansion Act is Field Preempted Under the Supremacy Clause of the United States Constitution Because it Interferes with the PJM Market Regulated by the Federal Energy Regulatory Commission.

Any state law that intrudes into an exclusively federal field is preempted and rendered invalid. *Solomon*, 766 F.3d at 250. Therefore, if a federal agency has jurisdiction over a subject, a state agency cannot have jurisdiction over the same subject. *Nazarian*, 753 F.3d at 475.

A state act is field preempted when it functionally sets the rate that a power company receives for its sales in the PJM auction. *Nazarian*, 753 F.3d at 476. In *Nazarian*, the Maryland Public Service Commission offered potential bidders a twenty-year revenue stream if successful to attract bids for new generation. *Id.* at 473. Under Maryland's plan, the company with the winning bid would build its plant and sell energy and capacity on the federal interstate wholesale markets. *Id*. If that company successfully cleared the market, it would be entitled to receive

payments from local electric distribution companies that amounted to the difference between the company's electricity and capacity revenue requirements from its winning bid and its actual sales. *Id.* at 473-74. The *Nazarian* court held that the state law was field preempted because it had the effect of replacing the rate generated by the PJM auction with an alternative rate preferred by the state; an area of exclusive federal authority. *Id.* at 476. To the court, the state law compromised the integrity of the federal scheme and intruded on FERC's jurisdiction, rendering it preempted. *Id.*

When a state act sets capacity prices, it is regulating in the same field as occupied by FERC and is therefore invalid. *Solomon*, 766 F.3d at 250. In *Solomon*, the state of New Jersey enacted the Long-Term Capacity Pilot Program Act. *Id.* at 246. This Act guaranteed revenue to generators by fixing the rate at which those generators would receive for supplying electrical capacity. *Id*. In effect, the legislature of New Jersey acted to produce additional electric generation in the state by giving generators fifteen-year contracts to supply a state-determined amount of capacity at a state-determined rate. *Id.* at 248. The court in *Solomon* held that this state act was field preempted by FERC. *Id.* at 250. The court reasoned that FERC alone has the responsibility to ensure that wholesale rates are just and reasonable and therefore, the state Act was interfering in a field occupied by the federal government. *Id.* at 247.

This Court should hold that the state law is preempted by the federal law because the state law is effectively replacing the rate generated by the market approved by FERC with one preferred by the state. (R. at 7.) Franklin's CAP program offers a ten-year contract to eligible coal-fired generation plants. (R. at 7.) Franklin's PSC then collects revenues to fund the program by setting the rates for utilities. (R. at 7.) This is analogous to the market infringement by the state of Maryland in *Nazarian*, which effectively set the prices that a power company would

receive for its sales in the PJM auction. *Nazarian*, 753 F.3d at 476. Like the Generation Order did in *Nazarian*, the CAP program compromises the integrity of the federal scheme by infringing on the energy market and intrudes on FERC's jurisdiction. Because the court in *Nazarian* held that setting prices preferred by the state over those generated by the market regulated by FERC intruded on FERC's exclusively occupied field, this Court should also hold that Franklin's CAP program intrudes on FERC's exclusively occupied field.

This Court should also hold that the state law is preempted by the federal law because the state is setting rates at which utilities are sold. (R. at 7.) To fund the CAP program, Franklin is compelling the PSC to set prices for utilities. (R. at 7.) This is analogous to *Solomon*, in which the state of New Jersey set capacity prices and therefore regulated the same field as FERC. *Solomon*, 766 F.3d at 250. Capacity is a measure of how much energy "traffic" a system can accommodate. *Id.* at 247. Therefore, setting prices for capacity is effectively no different from setting prices for the energy itself. *Id.* Because the court in *Solomon* held that the state law setting capacity was preempted by the federal interest in regulating the entire field, this Court should also hold that the state law setting utility prices is preempted by the same interest.

When FERC, a federal regulatory commission, occupies a field exclusively, any state law which attempts to regulate within that field is preempted. *Solomon*, 766 F.3d at 246. Franklin's CAP program infringed on the field exclusively occupied by the federal government by setting rates and interfering with the PJM market. (R. at 7, 11.) Therefore, Franklin's CAP program is field preempted.

## II. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION BECAUSE THE STATE OF FRANKLIN FAILED TO SHOW THAT ITS REGULATION IN THE ENERGY DIVERSIFICATION AND EXPANSION ACT WAS NOT CONFLICT PREEMPTED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Franklin's Energy Diversification and Expansion Act is conflict preempted under the Supremacy Clause of the United States Constitution because compliance with the Act directly conflicts with FERC's regulation of the PJM market and it is not possible to comply with both regulations.

The United States' Constitution and the laws made by the United States in furtherance of the Constitution are the supreme law of of the land and judges are bound by them. U.S. Cont. amend. VI, § 2. In this system, federal law is supreme to and commands primacy over state law. *Solomon*, 766 F.3d at 250. A state law is specifically conflict preempted if, under the circumstances of a particular case, the state law is an obstacle to the full accomplishment and execution of the objectives set out by congress or the agency it regulates. *Nazarian*, 753 F.3d at 478. If compliance with both federal and state regulations is not possible, the federal law must be held to preempt the state law. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

A state law is conflict preempted when the law has the potential to distort the PJM's price signals. *Nazarian*, 753 F.3d at 478. As discussed above, the state of Maryland enacted a law which prioritized its incentive structure over the incentive structure approved by FERC. *Id.* at 479. The *Nazarian* court held that the state law was conflict preempted because the incentive contracts offered by the state directly conflicted with the auction rates authorized by FERC. *Id.*

In a situation where it is possible to comply with both federal and state regulatory laws, the state law is not conflict preempted. *Florida Lime*, 373 U.S. at 143. In *Florida Lime*, the state

of California enacted a law which prohibited avocados from being sold if they contained less than 8% of oil by weight, excluding the skin. *Id.* at 133. The federal law on the subject had no requirement for percentage of oil in avocados by weight. *Id.* at 135. As it is possible to comply with both the federal and state regulations, the Court held that there was no conflict preemption because the two regulations were not actually in conflict. *Id.* at 141.

Even if this Court is not convinced that the state law is field preempted by FERC's regulations, the Court should hold that the state law is conflict preempted. In *Nazarian*, the incentive contracts provided by the state of Maryland directly conflict with the federal auction rates provided by FERC. *Nazarian*, 753 F.3d at 479. In this case, the state of Franklin is also offering incentive contracts that purport to replace the federal market, which is operated pursuant to tariffs approved by FERC. (R. at 11.) It is not possible for eligible coal-firing companies to operate under the contracts administered through the CAP program while simultaneously operating in the PJM auction market. Because the court in *Nazarian* held that the program was conflict preempted by FERC's regulation, this Court should also hold that Franklin's CAP program is conflict preempted by FERC's regulation.

This case is easily distinguishable from *Florida Lime*. In *Florida Lime*, it was possible for a party to comply with both federal and state regulations on avocados, a field in which the federal government had not intended to exclusively occupy. *Florida Lime*, 373 U.S. at 142. The federal government set the minimum standard for oil in avocados and then the state regulated a different aspect of avocado growth. *Id.* at 135. In this case, PJM operates a competitive wholesale electricity market in accordance with tariffs approved by FERC. (R. at 11.) The state law purports to replace this market by setting prices on utilities preferred by the state. (R. at 7.) Notwithstanding the fact that FERC has intended to regulate exclusively in the field, compliance

with both programs is simply not possible. An electricity company cannot operate both in the competitive federal market while subsequently be receiving CAPs from the state and thus allowing the state to set their prices. Therefore, Franklin's CAP program is in direct conflict with FERC's regulations.

When FERC, a federal agency, enacts a regulation, any regulation by a state which is in conflict is preempted. *Nazarian*, 753 F.3d at 479. Franklin's CAP program conflicts with FERC's regulation of the market in the PJM Interconnection by allowing the state to set prices other than those determined by the PJM's competitive market. (R. at 7, 11.) Therefore, Franklin's CAP program is conflict preempted.

## III. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION BECAUSE THE STATE OF FRANKLIN FAILED TO SHOW THAT THE LIMITATIONS OF CERTIFIED BIOMASS FEEDSTOCK UNDER SECTION 2(A) OF THE ACT DO NOT DISCRIMINATE OR UNDULY BURDEN OUT-OF-STATE INDUSTRIES.

Under the United States Constitution, Congress has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is a restriction applied to the States to prevent the discrimination or unduly burdening of interstate commerce. *C & A Carbone v. Clarkstown*, 511 U.S. 383, 389 (1994). Some regulations require a national and uniform rule that Congress has the best ability of providing while some regulations are local in nature and require diverse regulations that are best handled at the state level. See *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). Although some regulations are best handled at the state level, courts will invalidate laws that treat in-state and out-of-state goods differently. See *Granholm v. Heald*, 544 U.S. 460 (2005).

A statute that discriminates against out-of-state commerce must be the least restrictive

means of meeting the compelling governmental interest. *Hughes v. Oklahoma,* 441 U.S. 322*,* 327 *(1979).* Appellant was a commercial minnow seller that was convicted under an Oklahoma law that prohibited the sale of minnows that originated in the state, but could be sold outside the state. *Id*. at 323 The Oklahoma law was enacted to protect against the depletion of minnows in Oklahoma's natural streams. *Id*. The Court held that the statute was in clear violation of the dormant Commerce Clause because it unduly burdened the transportation of a commodity outside of the state and there were less restrictive means of meeting the governmental interest of preservation of the minnow population. *Id*. at 338.

A state cannot enact a regulation to benefit a major local industry. *Wyoming v. Oklahoma*, 502 U.S. 437, 453 (1992). Wyoming challenged a regulation that Oklahoma enacted to require Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal. *Id*. at 442. Oklahoma enacted this statute to promote economic development of its coal mining industry within its borders. *Id*. at 453. The Court held that the statute was invalid under the dormant Commerce Clause because the statute clearly discriminated against out-of-state coal for a preference of in-state coal. *Id*.

A regulation the prohibits the use of goods produced outside the state has the burden of demonstrating the regulation serves a legitimate and compelling interest unrelated to economic protectionism. *Alliance For Clean Coal v. Bayh*, 72 F.3d 556, 561 (7th Cir. 1995). Indiana passed a regulation that prohibited energy producers from purchasing coal from out-of-state mines to promote clean energy and promote coal mining within the state. *Id.* at 558. The court held that the regulation discriminated against interstate commerce based solely upon the geographical origin of the out-of-state goods, with clear intention to favor goods produced from

within the state. *Id*. at 560.

This case is easily distinguishable with *Hughes v. Oklahoma*. In *Hughes*, Oklahoma enacted a statute that prevented the sale of minnows that originated from Oklahoma's waterways outside the state, but did not prohibit the sale within the state. *Hughes*, 411 U.S. at 323. Here, Franklin passed the Act which required electricity utilities to meet a 15 percent mandate of using certified biomass feedstock which can only be obtained from designated biomass growing regions. (R. at 4.) The Act provided some factors for the DNR and FDC to consider, including selecting areas in Franklin that were economically depressed. (R. at 9.) By selecting economically depressed areas within Franklin and only permitting electricity generating plants to purchase certified biomass feedstock that can only be produced in Franklin to reach the required 15 percent use of biomass that is imposed under the Act; the certified biomass feedstock designation is intended to benefit an in-state industry and prevent out-of-state biomass feedstock from being sold in Franklin and therefore is in violation of the dormant Commerce Clause.

The case at hand mirrors the facts in *Alliance for Clean Coal v. Bayh*. In *Alliance for Clean Coal*, Indiana passed a regulation that prohibited coal fired plants from purchasing coal that originated from out-of-state to promote clean coal. *Alliance for Clean Coal*, 72 F.3d at 556. The court held that the regulation discriminated against out-of-state coal while favoring in-state coal. Here, the DNR and FDC selected areas within Franklin that would benefit economically from an increased biomass feedstock industry in Franklin. (R. at 9.) Because the Act limits the areas that are eligible to being selected as a designated biomass growing region to only being located within Franklin, this Court should find that the Act and subsequent designation of certified biomass feedstock creates a barrier that prevents out-of-state biomass from being sold in Franklin and thus is invalid under the dormant Commerce Clause.

The Act is similar to the statute in *Wyoming v. Oklahoma*. In *Wyoming*, Oklahoma enacted a statute that required all coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal that contained at least 10 percent coal that was produced from mines in Oklahoma. *Wyoming*, 502 U.S. at 443. The Court found that the statute was enacted to benefit a struggling coal industry in Oklahoma. *Id.* Here, Franklin's DNR and DC designated selected areas to be a designated biomass growing region; areas of Franklin that have been affected by the struggling coal industry as an attempt to help stimulate those local communities. (R. at 9.) This Court should find that the designations under the Act is similar to the statute in Wyoming because the Act was enacted to promote the growth of the biomass industry while discriminating against out-of-state biomass and therefore find it in violation of the dormant Commerce Clause.

## IV. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION BECAUSE THE STATE OF FRANKLIN HAS FAILED TO SHOW THAT THE GEOGRAPHIC LIMITATION OF ELIGIBLE FACILITIES UNDER THE ACT DO NOT DISCRIMINATE AGAINST OUT-OF-STATE ENERGY PRODUCERS.

Under the United States Constitution, Congress has the power to implement regulation on commerce…among the several states. U.S. Const. art. 1, § 8, cl. 3. The dormant Commerce Clause restricts states from enacting regulations that discriminate or unduly burden interstate commerce. *Wyoming*, 502 U.S. at 453. The Court will strike down a state statute when it discriminates against interstate commerce unless the discrimination is justified by a factor that is not connected to economic protectionism. *Id*.

State laws violate the Commerce Clause when it mandates differential treatment of in-state and out-of-state economic interests that benefits in-state economic interests and burdens out-of-state economic interests. *Granholm v. Heald*, 544 U.S. 460, 482 (2005). The regulation

allowed the sale of wine from in-state wineries to directly ship products to customers but prohibited out-of-state wineries from doing the same. *Id.* at 467. In-state wineries could obtain a license for direct shipments to consumers and out-of-state wineries were not unless the wineries met requirements set forth by the states. *Id.* In Michigan, wineries could apply for a winemaker license that allowed direct shipment to in-state consumers and the price of the license varied; for out-of-state wineries, the price was $300 and only allowed those wineries to ship to wholesalers, not directly to the customer. *Id.* In New York, wineries that produce wine from only New York grapes could apply for a license that allowed for direct shipment to customers in-state. *Id.* at 468. Out-of-State wineries had to open a branch factory, office, or storeroom within New York to become eligible to ship directly to NY consumers. *Id.* The Court held that the statutes violated the Commerce Clause because the regulations were unduly burdensome on out-of-state wine and the states could not support the need for strict regulations against out-of-state goods. *Id.* at 482.

States cannot erect an economic barrier protecting a major local industry against competition if there are reasonable nondiscriminatory alternatives to achieve the legitimate, compelling local interest. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The city of Madison enacted a statute that prohibited the sale of milk within city limits if the milk was produced outside a five-mile radius of the city. *Id*. at 350. This regulation was enacted to provide the necessary health and safety of the milk sold to residents of Madison. *Id*. The Court held that the statute erected an economic barrier that was intended to benefit local milk producers and there were less restrictive means to ensure the health and safety of milk produced outside of the five-mile radius. *Id.* at 354.

Eligible facilities under Sections 1 and 2(b) of the Act are much like the statutes in *Granholm v. Heald.* In *Granholm*, two states enacted statutes that prohibited out-of-state

wineries from obtaining a license to allow direct shipment to customers within each state, but did not prohibit in-state wineries from obtaining the license to have direct shipments. *Granholm*, 544 U.S. at 467. The Court held that favoring in-state wineries violated the dormant Commerce Clause and there were less restrictive means of achieving the goal. *Id*. at 482. Here, after enacting the Act, PSC was granted the power to determine which coal-fired electricity generating plants would be considered an eligible coal-fired generating plant to receive the benefits of the CAPs program. (R. at 7.) The PSC selected 5 plants, in which all but one are located within the borders of Franklin. *Id*. This Court should find the eligible facilities under the Act to be invalid under the dormant Commerce Clause because the requirements that 10% of the coal used at a coal-fired plant and that they must be from one of three zones within the PJM operating region to be selected as an eligible facility to mirrors the effects of the statute in *Granholm* which unduly burdened out-of-state producers.

The eligible facilities designation by the PSC resembles the effects of the economic barrier the City of Madison attempted to enact in *Dean Milk Co. v. Madison*. In *Dean Milk*, the City of Madison enacted a regulation that required milk be produced within a five-mile radius from the city center. *Dean Milk*, 340 U.S. at 350. The Court found that the statute erected an economic barrier that clearly favored local industry. *Id*. at 352. Here, the requirements under the Act for potential eligible facilities in Franklin creates an economic barrier to exclude out-of-state coal producing plants. Because the geographical limitation of the requirements set forth under the Act favors in-state electricity producers, this Court should find the eligible facilities section of the Act to be invalid under the dormant Commerce Clause.

## CONCLUSION

For the reasons stated above, this Court should affirm the holding by the U.S. District Court for the Eastern District of Franklin that the Energy Diversification and Expansion Act enacted and administered by the state of Franklin violates the Supremacy Clause and dormant Commerce Clause of the United States Constitution and is therefore unconstitutional.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Team No. 16 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.* 16