IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 16-01234

State of Franklin,

Appellant,

-v.-

Electricity Producers Coalition,

Appellee.

Appeal from the United States District Court for the Eastern District of Franklin

D.C. No. 16-02345

Appellant's brief filed on behalf of the State of Franklin
against district court summary judgment decision

Team No. 7

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JURISDICTIONAL STATEMENT

The U.S. District Court for the Eastern District of Franklin had jurisdiction over the subject matter under 28 U.S.C. § 1331 because the claims arose under federal law, specifically the Supremacy Clause and the Commerce Clause of the U.S. Constitution. Jurisdiction of the 12th Circuit Court of Appeals over this matter is invoked under 28 U.S.C. § 2291 as the court has appellate jurisdiction over final decisions of cases from federal district courts within their territory including the Eastern District of Franklin. It is an appeal of a judgment of the U.S. District Court for the Eastern District of Franklin, dated November 7th, 2016. The appeal is expressly provided for by law under Rule 3 of the Federal Rules of Appellate Procedure. The motion for appeal was filed timely within 30 days of the District Court order granting the motion for summary judgment, and the order granting the appeal proceedings was signed on January 6, 2017.

STATEMENT OF THE ISSUES PRESENTED

I. The Federal Energy Regulatory Commission (FERC) is authorized by statute to regulate "the sale of electric energy at wholesale in interstate commerce," and any rule or practice "affecting" such rates (16 U.S.C.S. § 824d). The Carbon Assistance Payment (CAP) program instituted by Franklin provides a credit to electricity producers which is recouped through retail rate increases by intrastate utility distributors. Would the CAP program be field preempted by FERC authority for interstate wholesale electricity sales?

II. When a State law prevents the accomplishment of a Federal objective, the State is preempted from enforcing their law and the Federal law will prevail. Franklin's CAP program subsidizes aging electrical generating plants to maintain reliable electrical production at a reasonable rate

for area consumers which is the same intent of the FERC regulations. Would the CAP program be conflict preempted by FERC authority even if the laws have the same purpose?

III. Whether the District Court for the Eastern District of Franklin committed error under the Commerce Clause of the U.S. Constitution when it granted the plaintiff's motion for summary judgement in regard to the Section (2)(a) without weighing the local benefits of against the burden interstate commerce.

IV. Whether the District Court for the Eastern District of Franklin committed error under the Commerce Clause of the U.S. Constitution when it granted the plaintiff's motion for summary judgement in regard to the Section (2)(b) without considering the State's nondiscriminatory justifications.

STATEMENT OF THE CASE

The Electricity Producer's Coalition ("EPC") is a national trade association representing leading competitive electric power suppliers. The EPC's members include companies that are involved in competitive wholesale and retail electricity markets, with financial investments in electricity generation and electricity marketing operations in Franklin and throughout the PJM operating region.

The EPC commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin. The EPC sought a declaratory ruling that (1) the CAP program violates the Supremacy Clause of the U.S. Constitution given FERC's exclusive authority over "the sale of electric energy at wholesale in interstate commerce; and (2) the modifications to Franklin's existing RPS violate the dormant Commerce Clause given their discriminatory impact on interstate commerce. Shortly after the action was commenced in U.S. District Court for the

Eastern District of Franklin in July 2016, EPC and Franklin filed cross-motions for summary judgment. (R.12). The District Court found that the Energy Diversification and Expansion Act ("EDEA") enacted by the State of Franklin, as implemented by the Franklin Public Service Commission (and certain other state agencies in Franklin), is unconstitutional under the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution. (R.1).

In its decision issued on November 7, 2016, the District Court granted EPC's motion for summary judgment. (R.12). Appellant, the State of Franklin timely submitted appeal, and this court granted appeal on January 6th, 2017.

STATEMENT OF THE FACTS

In 1935 Congress enacted the Federal Power Act, granting Federal regulators (currently FERC) authority over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. The Act constrained the reach of Federal authority "to extend only to those matters which are not subject to regulation by the States." Therefore, the States have retained authority over retail sales to end-use consumers, such as residents and local businesses. (R.11). In 1996, the State of Franklin passed the Electric Customer Choice and Competition Act. The 1996 Act restructured Franklin's electricity markets to introduce competition at the retail level. Customer choice acts in other jurisdictions have opened the market for consumers to not only the utilities operating within their region but also markets operating in neighboring regions. (R.5).

Of the Seven regional markets in the U.S. operated by Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs"), the state of Franklin is located within the region served by the PJM Interconnection ("PJM"). (R.11). The PJM

Interconnection, is the ISO serving all or part of 13 mid-Atlantic and Midwestern states and the District of Columbia. Franklin distribution utilities selling electricity to ratepayers purchase that electricity at wholesale from independent power producers, either through bilateral contracts or through competitive wholesale markets administered by RTOs or ISOs, which are independent, non-profit entities regulated by FERC. (R.5). PJM operates its market in accordance with tariffs approved by FERC. (R.11). In 2007, Franklin's legislature enacted its Renewable Portfolio Standard ("RPS"), requiring the five electric distribution companies operating within Franklin to secure 20% of the electricity sold to retail customers within Franklin from renewable sources by 2020, with that percentage increasing to 30% by 2030. (R.8).

Subsequently, in January 2016, Franklin enacted the Energy Diversification and Expansion Act ("EDEA") with the goal of preserving the economic viability of the existing coal-fired generating plants and stimulating the development of a biomass industry. At the time of the EDEA's enactment, Franklin was the third-largest coal producing state in the country, deriving 82% of its electricity from coal. The remainder of Franklin's electricity generation came from natural gas (10%), wind (5%), biomass (2%), and solar photovoltaic (1%). In addition to Franklin's coal resources, 77% of the State is covered in forest, making it the third-most forested state in the country. However, Environmental Protection Agency ("EPA") regulations aimed at reducing greenhouse gas emissions led to the closure of a number of large coal plants within Franklin and put many more at risk of being phased out in the near future. These coal plants provided a variety of crucial economic benefits to Franklin and helped to ensure a reliable source of generating capacity within the mid-Atlantic region and specifically the PJM which serves approximately 61 million electricity consumers. (R.3).

Consistent with the objectives of preserving economic viability of existing coal-fired generation and stimulating the development of a biomass industry, the EDEA includes two sections that can be broken into three separate provisions. Section 1 calls for the creation of the CAP system to help coal-fired generating plants stay in business while they adapted to new environmental regulations and increase their use of biomass fuels for electricity production. (R.3). Pursuant to Section 1, five coal-fired plants were identified to receive the CAPs. The funding for the CAPs comes from assessments against five electric distribution utilities operating within Franklin. The Franklin Public Service Commission ("PSC") then adjusts the rates accordingly for retail customers within Franklin in order for the distribution utilities to recoup the CAP assessments. (R.7). The electricity and capacity for production from the CAP subsidized generators are introduced into the PJM market for interstate wholesale electricity sales under the terms of their participation in the PJM ISO. This electricity and capacity can also be sold directly to consumers through bi-lateral agreements (R.5).

The second and third provisions of the EDEA are found in Section 2. Both involve modifications to Franklin's existing RPS which has been in place since 2007. Section 2(a) modified the existing RPS to impose a requirement on electric distribution companies to procure a portion of their electricity supply from electric generating plants that are co-fired with both coal and biomass. Section 2(b) modified the existing RPS to include a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities with biomass. (R.4). Despite the fact that the provisions of subsections (a) and (b) are contained under Section 2; the provisions are different and function independently.

SUMMARY OF THE ARGUMENT

The Appellant asks this court to vacate the order of the District Court for the Eastern District of Franklin and to remand the case for trial based on two reasons. First, Franklin asserts that the EDEA is not preempted by the FERC regulations because the EDEA constitutes a state developing and enforcing laws related to electricity production within their state boundaries. The District Court was incorrect in its finding for summary judgment as EPC did not establish that the EDEA had a "direct" effect on the ability of FERC through the PJM to regulate and control the prices of wholesale interstate electricity. Further, the Supremacy Clause of the Constitution should not be invoked to preempt the EDEA as the act did not frustrate the objectives of FERC regulations, instead the EDEA provided a complimentary role to the FERC regulations in furtherance of their goals to increase cleaner electricity production and provide reliable service to customers.

Second, Franklin asserts that the District Court did not properly consider the local benefits provided by the EDEA against the burdens on interstate commerce as required by the dormant Commerce Clause precedent of the Supreme Court. Franklin emphasizes that any geographic limitation associated with "certified biomass feedstock" is not defined according to state borders, but rather is tied to factors geared toward the sustainability of the feedstock for co-firing with coal in power plants. Additionally, Franklin denies that its RPS provision promoting distributed generation resources runs afoul of the dormant Commerce Clause. The purpose of the provision is not to discriminate against out-of-state renewable resources, but rather to capture the unique benefits of customer-sited generation, such as improved resilience of the electric utility grid, reduced transmission and distribution costs, and increasing the ability of customers to manage their energy costs.

STANDARD OF REVIEW

The four issues presented require the court to review the application of Article 6, Clause 2, and Article 1, Clause 8, of the United States Constitution as to whether an act by the State of Franklin would be in violation of those two articles of the Constitution. This presents a question of law and questions of law are reviewed de novo. *Bose Corp. v. Consumers Union,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

ARGUMENT

A. THE EDEA IS NOT PREEMPTED BY FEDERAL LEGISLATION.

I. THE CARBON ASSISTANCE PAYMENTS ARE NOT FIELD PREEMPTED BY FERC AUTHORITY BECAUSE THEY DO NOT "DIRECTLY" AFFECT INTERSTATE WHOLESALE ELECTRICITY RATES.

Article 6, Clause 2, of the United States Constitution, establishes that Federal law shall be the supreme law of the land therefore when Congress has occupied a field of the law then Federal law will preempt conflicting State law. When evaluating an issue for preemption of State law by a Federal statute or regulation, there is an assumption against preemption unless the Congress makes clear their intent to occupy a specified field of regulation. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947). The FERC regulations are clear in the establishment of their authority over wholesale energy sales for interstate electricity transmission and capacity, therefore it is clear that the Congress intended for FERC to be the sole controlling authority when it comes to the pricing of electricity in the wholesale interstate market[1]. The question here is whether the actions taken by Franklin do have an impact on those wholesale interstate electricity markets. To answer this question the court must review not only the stated purpose of the actions taken by Franklin, but also the results of their actions which may affect the wholesale interstate electricity market established by the PJM Interconnection, which is the Independent Systems Operator (ISO) region that Franklin is located within. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760 (2016).

Franklin's stated purpose for the EDEA was to preserve the economic viability of the existing coal-fired generating plants and to stimulate the development of a biomass industry. (R.

[1] The Federal Energy Regulatory Commission (FERC) is authorized by statute to regulate "the sale of electric energy at wholesale in interstate commerce," and any rule or practice "affecting" such rates (16 U.S.C.S. § 824d).

3). These goals are to be achieved by three measures: providing financial incentives, CAPs to eligible coal-fired generating plants serving Franklin; modifying the existing Renewable Portfolio Standard (RPS) for Franklin to increase the energy production from plants that use both coal and "certified biomass feedstock"; and modifying the RPS to include customer-sited combined heat and power (CHP) facilities. (R. 3-4). As the EDEA makes no mention of taking these measures with the intent of affecting the PJM wholesale energy market, the court must examine the resultant effects that these measures would have on the market.

Electricity Producers Coalition argued, and the trial court agreed, that the "practical effect" of the CAPs to eligible coal-fired generating plants would be to affect the wholesale electricity market, particularly the setting of capacity prices by PJM. (R. 13). The CAPs provided through the EDEA do not affect the wholesale electricity market because the impact of the CAPs is limited to intrastate transactions. A recent Supreme Court decision considered the application of the FERC statutes and determined that in the interest of limiting the scope of how the term "affecting" rates would be used, the term should be seen instead as "directly affecting" so as to not include instances where actions by the State indirectly affected rates. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 766 (2016). In *FERC,* the Court referred to a previous ruling by the D.C. circuit court of appeals[2] distinguishing actions that "directly affect" rates as, ". . . not all those remote things beyond the rate structure that might in some sense indirectly or ultimately

[2] "The practices at issue 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. §§824d(a), 824e(a). To prevent the statute from assuming near-infinite breadth, see e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, this Court adopts the D. C. Circuit's common-sense construction limiting FERC's "affecting" jurisdiction to rules or practices that "directly affect the [wholesale] rate," *California Independent System Operator Corp. v. FERC*, 372 F. 3d 395, 403, 362 U.S. App. D.C. 28 (emphasis added)."

[affect the wholesale electricity rate].” *Cal. Indep. Sys. Operator Corp. v. FERC*, 362 U.S. App. D.C. 28, 36 (2004). The process of providing CAPs to coal-fired generating plants is an intrastate matter involving distribution utility companies and retail customers within the State of Franklin. Therefore, any effect on interstate wholesale electricity or capacity rates would be indirect and thus not preempted by FERC authority.

To see how the effect of the CAPs would be indirect, the court must look at the manner in which the CAP program is enacted. Part of the difficulty in evaluating the effect of State actions in their retail market on the wholesale interstate market such as that administered by the PJM Interconnection is that the two markets are admittedly “inextricably linked.” *FERC v. Elec. Power Supply Ass'n,* 136 S.Ct. 760, 766 (2016). However, the link between these two markets does not guarantee that there is a direct effect between a State action and the rates charges in the wholesale interstate electricity market. FERC has authority over the wholesale electricity market, but the regulation of the intrastate retail markets has been left to the states to administer[3]. With this authority, the State of Franklin enacted the CAP program.

The process of providing the CAPs is that the Franklin State Energy Office (SEO) assesses the amount needed to pay for the CAPs against the five distribution utility services operating within Franklin. (R. 7). The distribution utility companies then increase their rates charged to consumers in the retail market accordingly to recoup the CAP assessment. CAPs are

[3] The court established that regulation of retail market electricity sales was a state jurisdictional matter. Specifically, it referenced a clause in section 201(a) of the FPA, which states that FERC's reach "extends only to those matters which are not subject to regulation by the States." As a result of this clause, along with other language in 201(b) that makes the FPA inapplicable to "any other sale" (other than wholesale sales), the D.C. Circuit reasoned that "states retain exclusive authority to regulate the retail market. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 766-68 (2016).

then made by the SEO to the eligible coal-fired electricity generating plants. There would be an indirect impact of the CAPs at the wholesale market level in terms of the value of capacity for the CAP subsidized electricity generators, but the focus should be on actions "directly affecting" the market. Even if it was determined that the CAPs have a direct effect on the wholesale market, it would still be up to FERC to determine whether or not this effect makes the prices of electricity unreasonable given all of the circumstances involved.

The State and the Federal government both have a legitimate concern that markets will provide reliable and reasonably priced energy to customers. In the past courts had relied on a dual sovereignty doctrine which was aimed at placing the issue in dispute within the different spheres of interest of the State and Federal government and then determining who had the prevailing interest in the subject. Modern approaches to this issue have recognized the doctrine of concurrent jurisdiction, meaning that both the State and Federal governments can have legitimate claims to jurisdiction that do not necessarily have to supersede the other[4].

As stated previously, the assumption of the court is against preemption of State laws by Federal laws. *Rice v. Santa Fe* at 230. Applying concurrent jurisdiction doctrine, the courts are able to see that the efforts of the State and Federal government may be complementary to each other as opposed to adversarial, which may benefit the public interest of all concerned. The FERC statutes and the EDEA both have a common goal of bringing reasonably priced and reliable energy to customers. The energy grid is changing, it is departing from the vertically integrated models of the past, to include more methods of delivery to consumers and even customer-sighted energy production also known as Distributed Energy Resources (DERs).

[4] *The Brave New Path of Energy Federalism*, 95 Tex. L. Rev. 399

Franklin saw a need to adapt their energy production model and provide incentives not only for coal based electricity production but also alternative fueled production and DERs. The common motives for these changes being: increasing the resilience of the electrical utility grid, decreasing transmission and distribution costs, and providing additional tools for customers to manage their energy costs. (R. 4-5). Applying FERC authority to limit such State experimentation with new methods of service delivery would be counter-productive to much of the efforts that have already begun in Franklin as well as many other States. As the Federal government was responsible for enacting the EPA regulations which reduced the ability of Franklin to utilize their abundant coal resources, it should only be fair that Franklin be allowed to adapt their electricity production process to conform to these Federal standards. Public interest is served not only by the reduced carbon emissions that are encouraged by the EDEA and its CAP program, but also by the employment opportunities for citizens and tax revenue for the State.

The Federal interest is not so dominant that FERC is assumed to preclude enforcement of Franklin's law on the same subject. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). If the effect on the wholesale interstate electricity market is not a change in the reasonable prices and reliability of the electricity provided, then there is no justification for FERC authority to preempt the EDEA, especially when FERC is not the party claiming harm to the energy market but instead another energy production trade group with their own interests as is the case with the EPC. FERC has made no claim for preemption in this matter, therefore unless the agency does make such a claim then the courts run the risk of inhibiting the very innovation, service reliability, and reasonable pricing, which were the motivation for establishing the RTO model. As the electricity and capacity developed by the CAP generators must enter an open market with other providers who may sale their resources at a lower price, then the true impact of any price

change from Franklin generators will be determined by the PJM and FERC. If the impact does not cause a significant change to the reasonable price and availability of electrical energy in the market, then the only impact will be felt by those consumers who contract directly with the CAP generators and those consumers are free to contract with other generators and utility companies within the PJM service area.

II. THE EDEA DOES NOT CONFLICT WITH FERC AUTHORITY BECAUSE IT DOES NOT HINDER THE EFFECTIVENESS OF THE COMPETITIVE AUCTION MARKET PROCESS.

The Supreme Court has held that there are two kinds of conflict preemption: (1) impossibility—where a State law makes it impossible to comply with Federal law; or (2) State law prevents or frustrates the accomplishment of a Federal objective. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). The EDEA did not make it impossible for the CAP subsidized electricity generators to comply with Federal law, they would still be able to submit their electricity and capacity production to the PJM interstate market for sale to the consumers. Therefore, under *Geier* the CAP program must be evaluated in terms of how it may prevent or frustrate the accomplishment of a Federal objective. The District Court contends that the CAP program would interfere with the competitive auction process which is a key component of the wholesale interstate electricity market regulated by the PJM.

To better understand this issue, a brief review of the laws related to RTOs is required. In 1999, the Federal government amended their FERC regulations under the Federal Power Act to advance the creation of the RTO model. FERC developed the opinion, through the Notice of Proposed Rule Making period, that RTOs (which include the PJM ISO) would better facilitate the management of energy grids that spread over several states for regions of the United States

and would be interconnected with other RTOs and some energy grids in Canada[5]. It is currently estimated that approximately 2/3 of the electricity consumed in the United States is provided through RTOs[6]. In the final rule amending the FERC regulations to establish RTOs in 1999, some of the objectives listed for creating RTOs were to provide more reliable service at reasonable prices with a greater variety of choice for consumers who lived within the RTOs' areas of operation.

As part of the RTO model, wholesale interstate electricity is sold through a market where electricity generating companies submit their electricity production and capacity to the market for purchase by utility companies through a competitive bidding process. In this bidding process for the matter at issue, PJM determines Local Market Pricing (LMP) and generators submit their selling price below a maximum high set by the LMP and utilities submit their buying price above a minimal low set by the LMP. As bids come into the market the priority of selling the electricity is based in part by the type of generator which produced the electricity. The order of "clearing the market" for PJM goes as follows based on how the electricity was produced: 1st) Renewables, 2nd) Nuclear, 3rd) New Combined Cycles, and 4th) Coal[7]. Therefore, the choice of Franklin to subsidize the CAP generators does not prevent other forms of energy from coming into the market, but it does dictate where the priority comes for PJM to sale the electricity and capacity that they produce.

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[5] 64 FR 31390
[6] *EPSA, Electricity Primer - The Basics of Power and Competitive Markets.* https://www.epsa.org/industry/primer/?fa=wholesaleMarket (last visited February 8, 2017)
[7] *PJM Learning Center, Market for Electricity*. https://learn.pjm.com/electricity-basics/market-for-electricity.aspx (last visited February 9, 2017).

The ECP and the district court express concern over the EDEA and its impact in the wholesale market, however according to a FERC publication this concern may not be justified. According to the FERC Energy Primer[8] published in 2015, regarding the PJM capacity market, "Most capacity is procured through self-supply[9] and contracted (bilateral[10]) resources and the auctions procure any remaining needed capacity." With consumers in the PJM area primarily relying on other sources to secure capacity, it would be difficult to prove that the EDEA inhibits the Federal government from their stated objectives of reliability, reasonable pricing and consumer choice when FERC implemented the RTO model.

It should also be noted that there is a federal tax incentive in place similar to the CAP program to spur renewable resource investments. "Originally enacted in 1992, wind, biomass, geothermal, and other forms of renewable generation have been able to receive federal production tax credits (PTC) based on a facility's production. An inflation-adjusted credit, the PTC generally has a duration of 10 years from the date the facility goes online." *Energy Primer*, at 51. Given the similarity between the CAP and the PTC programs, the court may consider that the EDEA would be a complimentary program which would enhance and not conflict with the FERC authority and objectives. Some in the energy development market have expressed concern over the practice of suits brought by companies and organizations other than FERC to establish federal preemption:

> "It thus seems inconsistent with energy statutes such as the FPA for courts to make a preemption finding where FERC has not previously done so itself,

[8] *Energy Primer: A Handbook of Energy Market Basics.* FERC at 96 (November 2015)
[9] "Self-supply means that the supplying company generates power from plants it owns to meet demand." *Id.* at 58
[10] "Bilateral or OTC transactions between two parties do not occur through an RTO. In bilateral transactions, buyers and sellers know the identity of the party with whom they are doing business." *Id.* at 56.

> especially when the effect of preemption is to preclude any complementary state regulation. This kind of judicially imposed preemption approach lacks any democratic process to ensure political accountability for the statutory interpretation behind it - a flaw that echoes the ghost of dual sovereignty to the extent that courts themselves routinely defined the jurisdictional bright line, not FERC. By binding the agency's ability to allow complementary state approaches in the future, such an approach dictates the federalism balance for the agency, regardless of how well that regulatory approach actually works in energy markets."

The Brave New Path of Energy Federalism, 95 Tex. L. Rev. 399, 464-65.

The CAP program does not interfere with the market signals and inhibit economic generation because the program encourages the development of such electrical generation through subsidies. The energy provided by the Franklin generators must still compete in the market against other generators that may be providing energy at a lower cost, therefore it would only be harmful to the bi-lateral agreements in place between Franklin consumers and Franklin generators. These consumers still have the opportunity to contract with other energy providers and therefore the Federal objectives are not made impossible nor are they frustrated by the EDEA. The FERC regulations which regulate the PJM markets are a clear indication of the federal interest in the matter, but it should not preempt the EDEA without establishing a true conflict between the goals of the Federal government and the State of Franklin. "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985).

B. The EDEA is Constitutionally Valid Under Dormant Commerce Clause Doctrine

III. THE EDEA IS CONSTITUTIONALLY VALID UNDER DORMANT COMMERCE CLAUSE DOCTRINE.

The Commerce Clause; Article I, Sec. 8, Clause 3., states that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I. History indicates that the framers of the Constitution intended there to be a dormant Commerce Clause because of the potential for trade wars between states that was realized under the Articles of Confederation. Also known as economic Balkanization. *Hughes v. Oklahoma*, 411 U.S. 332, 325-26 (1979). Since *Gibbons v. Ogden*, *Gibbons v. Ogden*, 22 U.S. 1, 23 (1824) and *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), the Supreme Court has read the clause as embodying a dormant Commerce Clause. *Energy and Environment Legal Institute v. EPEL*, 193 F.3d 1169, 1171 (10th Cir. 2015). Employing dormant Commerce Clause jurisprudence, courts have claimed the authority to strike down state laws that, in their judgement, unduly interfere with interstate commerce. However, it is worth noting that there are detractors that find the dormant commerce clause absent from the Constitution's text and incompatible with its structure. With that being said, the dormant commerce clause jurisprudence remains very much alive today. *Id*.

There the Supreme Court read the Commerce Clause as allowing judges to strike down laws burdening interstate commerce when they find insufficient offsetting local benefits. The Court has also devised two firmer rules applicable to discrete subsets of cases. The First might be associated with cases like *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and applies to state laws that "clearly discriminate" against out-of-staters. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274, (1988). Legislation of this stripe is condemned as "virtually invalid *per se* and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *KT & G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008) (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 168 (2d

Cir.2005)). The Second finds its roots in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and is said to apply to certain price control and price affirmation laws that control "extraterritorial" conduct—that is conduct outside the state's borders. Here too the laws of that sort are deemed almost per se invalid. *KT & G. Corp*, 535 F.3d at 1143. In *EELI* Judge Gorsuch; writing for the Tenth Circuit, summarized the Supreme Court's development of the two *per se* rules of invalidity found in the *New Jersey* and *Baldwin* line of cases by analogizing to the Court's development of *per se* rules of invalidity in the antitrust context. *EELI*, at 1172. Gorsuch quoted the Supreme Court: "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations."

I. *Section 2(a) of the EDEA is valid under the dormant Commerce Clause*.

In granting the EPC's motion for summary judgement the District Court ruled that the that Section 2(a) of the EDEA was invalid under dormant Commerce Clause because the geographic limitations of "certified biomass feedstock" impermissibly discriminate against biomass produced outside of the state of Franklin, and thus burdens interstate commerce. The court based its ruling on the finding that the provision has the effect of limiting certified biomass feedstock to areas primarily located within the state of Franklin. However, under the dormant Commerce Clause jurisprudence of the Supreme Court, the District Court's finding is not determinative of a dormant Commerce Clause violation. In *Pike v. Bruce Church*, the Supreme Court stated that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," 39 U.S. 137 (1970). The District Court should not have condemned the EDEA without conducting further consideration of the local benefits and actual burdens on interstate commerce

in accordance with the Supreme Court precedent flowing from *Pike*. Moreover, the courts finding does not entitle the EPC to summary judgement in its favor as a matter of law under Rule 56(a) of the Federal Rules of Civil Procedure. Thus, the Franklin respectfully asserts that the District Court erred in granting the EPC's motion for summary judgement, and asks this court to vacate the District Court's order.

a. The geographic limitation associated with "Certified Biomass Feedstock" is not defined according to state borders.

At the time of the EDEA's enactment, Franklin's existing RPS required the five electric distribution companies operating within Franklin to secure 20% of their electricity sold to retail customers within Franklin from renewable sources by 2020, with that percentage increasing to 30% by 2030. Eligible renewable energy sources were defined to include solar, wind, geothermal, biomass, and small-scale run-of-river hydro. EDEA Section 2(a) modified Franklin's existing RPS to include an additional requirement imposed on electric distribution utilities to procure a specified percentage of their electricity supply for retail customers within Franklin from electric generation plants fired with a fuel supply comprising of coal and no less than 15% certified biomass feedstock. Specifically, Section 2(a) set the procurement obligation for electricity generated at co-fired power plants at 3% beginning in 2020, growing to 5% by 2030. The Franklin DNR and Franklin DOC were charged with designating a biomass region pursuant to Section 2(a)(4) of the Act. (R.8). The language at issue in this case is found in Section 2(a)(4) which defines "Designated Biomass Growing Region" as "[A]n area within the state of Franklin and the adjoining states thereto." (R.9). On this basis alone, the District Court condemned the EDEA, reasoning that the geographic limitation impermissibly discriminates against biomass produced outside of the state of Franklin. (R.13). However, the fact that the

areas are located primarily within the state of Franklin is not determinative of violation of the dormant Commerce Clause under Supreme Court precedent. In *Minnesota v. Clover Leaf Creamery*, the Supreme Court held that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominately in-state industry." 449 U.S. 456, 474 (1981). Although this language does impose a geographic limitation of "certified Biomass feedstock," that limitation does not discriminate against out-of-state biomass simply because it was not harvested within the state of Franklin. This is evidenced by the fact that one of the certified biomass regions identified by Franklin's state agencies consists of a 256 acre portion located within the state of Vandalia. (R.9). Because the statute does not expressly discriminate against interstate and intrastate commerce the controlling question should have been whether the incidental burden imposed on interstate commerce by the EDEA is clearly excessive in relation to the putative local benefits. *Clover Leaf Creamery*, at 472. The record indicates that the District Court did not make that consideration.

b. Under the Supreme Court's Pike balancing test the EDEA's burdens on interstate commerce are not clearly excessive in relation to the local benefits.

In *Clover Leaf Creamery*, the Supreme Court upheld the validity of a Minnesota state statute that favored the Minnesota's pulpwood industry over out-of-state interests. 449 U.S. 456, at 458. In that case, the respondents (plaintiffs below) were a collection of Minnesota and non-Minnesota businesses with financial interests producing plastic bottles dairy products that would be negatively affected by the state's statute. *Id.* The statute banned the retail sale of milk in plastic non-returnable, nonrefillable containers, but permitted such sale in other non-returnable,

nonrefillable containers such as paperboard milk cartons which were made from pulpwood. *Id*. at 458. The respondents argued that the statute violated the Equal Protection and Commerce Clauses of the Constitution. In rejecting the Minnesota Supreme Court's ruling against the state on equal protection grounds the Supreme Court said that states are not required to convince the courts of the correctness of their legislative judgements. Rather, those challenging the legislative judgement must convince the courts that the legislative facts on which the classification is based could not reasonably be conceived to be true. *Id*. at 465. And the Court reiterated that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Id*. at 470.

In rejecting the Minnesota Supreme Court's ruling against the state on Commerce Clause grounds, the Supreme Court first determined that the statute did not amount to simple protectionism, but regulated evenhandedly by prohibiting all milk retailers from selling their products in plastic non-returnable milk containers, "without regard to whether the milk, the containers, or the sellers are from outside the State." *Id*. at 471-2. The same can be said about the EDEA. Specifically, Section 2(a) requires distribution utilities to procure 15% of their fuel supply from certified biomass, without regard to whether the biomass, the forest resources, or the generation facility are form outside the state. This is evidenced by fact that one of the certified biomass regions identified by Franklin's state agencies consists of a 256 acre portion located within the state of Vandalia. (R.9).

After making the determination that the statute did not discriminate between interstate and intrastate commerce, the Court the Court determined that the controlling question was whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits." *Id*. at 472, (quoting *Pike v. Bruce Church,*

Inc., 397 U.S. 137 (1970)). The Court added that such a regulation only violates the Commerce Clause, if the burden on interstate commerce clearly outweighs the State's legitimate purposes. *Id*. Despite substantial overlap between the facts relevant to the Equal Protection issue and the balancing of interests under the Commerce Clause, the facts at issue in the *Clover Leaf Creamery* are substantially similar to the facts in this case. In the lower court proceedings of the *Clvoer Leaf Creamery* case there was debate as the actual purpose of the Minnesota statute, with opponents arguing that the purpose was economic protectionism or proponents arguing that the purpose was to serve legitimate state interest. *Id*. at 460-1. However, when the case reached the Supreme Court the parties stipulated that the purposes of the Minnesota statute; promoting resource conservation, easing solid waste disposal problems, and conserving energy, and further stipulated that those were legitimate state purposes. *Id*. at 461-2. After consideration of the statutes purpose and the actual burdens on interstate commerce, the Supreme Court found that the burden imposed on interstate commerce was relatively minor. *Id*. at 472. The Court reasoned that "[e]ven granting that the out-of-state plastics industry is burdened relatively more heavily than the Minnesota pulpwood industry, we find that this burden is no 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." *Id*. at 473.

A similar finding can be made in Franklin's case. The EDEA was implemented mitigate the electricity generation crisis that the State was experiencing. The relevant state interests are evidenced by the legislative findings and declarations set forth in the EDEA's preamble.[11]

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[11]In enacting EDEA, the Franklin legislature made the following findings and declarations, as set forth in the preamble to the Act: (1) mitigating the loss of significant electrical generation capacity in the mid-Atlantic region; (2) mitigating of local electrical system reliability concerns; (3) mitigating Franklin's capacity deficiencies by providing the necessary incentives to encourage the development of new generating capacity within the mid-Atlantic region, or to allow existing coal-fired generation to continue to operate; (4) ensuring a reliable and reasonably priced electricity supply for the public; (5) fostering and incentivizing the development of a limited

Franklin has the benefit of substantial biomass resource potential, given the extensive forests that cover 77% of the state. The Franklin legislature determined that the state has the opportunity to diversify its economy by taking advantage of the opportunities associated with the sustainable harvesting of its biomass resources. (R.5). In addition to the findings and determinations cited by the Franklin Legislature, the EDEA provides a number of crucial economic benefits to Franklin and the mid-Atlantic region. It allows the Franklin to mitigate risks to the State's that would result from closure of additional coal-fired plants. Converting the existing at risk plants to co-fired plants would preserve the property tax revenues flowing to the communities in which the plants are located, and also mitigate job loss for coal minors. Additionally, because the EDEA is merely a modification to the existing RPS; as opposed to a wholesale change, the state economy will still receive support from the continued production of coal within the and revenue from the associated coal severance tax.

c. There are no available less discriminatory alternatives.

Although the Federal Power Act granted FERC authority over the "transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce," the Power Act constrained the reach of federal regulatory authority "to extend only to those matters which are not subject to regulation by the States. The result is that the states have retained the authority over retail sales to end-use consumers, such as residents and local businesses. (R.11). Even though FERC 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., there is no evidence that the Power Act excludes Franklin from

program for new electric generating facilities; (6) reduction of greenhouse gas emissions from electric generating resources by integrating sustainably harvested biomass energy into the fuel supply for coal-fired power plants; (7) utilization of Franklin's substantial biomass resources; (8) increasing energy efficiency; and (9) reducing the environmental impact of the energy industry. (R.4-5).

implementing legislation like the EDEA which is intended to "supplement" the both the Power Act and Franklin's Electric Customer Choice and Competition Act of 1996.

However, in the preamble to the EDEA the Franklin legislature made two relevant findings and declarations. (R.4). First, the PJM Interconnection, which manages the regional electric power grid serving Franklin, lacks the authority to order new generation as a means of mitigating local electrical system reliability concerns and solving other issues related to the lack of local generation. (R.4). Second, the PJM capacity markets have failed to provide the necessary incentives to encourage the development of new generating capacity within the mid-Atlantic region, or to allow existing coal-fired generation to continue to operate. As a result, Franklin faces potential capacity deficiencies. (R. 4).

IV. 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 does not amount to a *per se* violation of the Commerce Clause.

Dormant commerce clause cases are said to come in three varieties. The farthest reaching of these may be associated with *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Supreme Court recognizes two varieties of *per se* violations under the Commerce Clause under *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). At issue in this case is the first variety associated with cases like *City of Philadelphia v. New Jersey*, and applies to state laws that "clearly discriminate" against out-of-staters. Legislation of this stripe is condemned as "virtually invalid *per se* and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Id*. 627. However, the District Court erred in granting EPC's motion for summary judgement without properly considering Franklin's justifications.

In *New Jersey v. Philadelphia*, the Supreme Court struck down a New Jersey law that prohibited the importation of most solid and liquid waste that originated or was collected outside the territorial limits of the State. 437 U.S. 617 (1978). The Court said, whatever the purpose of a state statute, 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. The Court held that the New Jersey municipal ordinance was both on its face and in its plain effect a violation principles of nondiscrimination. Adding that a State may not attempt to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. *Id*.

The crucial inquiry in this case must be directed to determining whether the Franklin statute is basically an economic protectionist measure, and thus virtually *per se* invalid, or a law directed at legitimate local concerns that has only incidental effects on interstate commerce. 437 U.S. 617, at 624. If a legitimate local purpose is found the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activity. In this case the carve-out provision is extremely small. *Id*. Franklin's EDEA does not have a protectionist purpose. Section 2(b) of the EDEA modified Franklin's existing RPS to include a "carve-out" for customer-sited CHP (or generation) facilities fueled with biomass that are connected to the distribution grid of an electric distribution utility serving customers of Franklin. (R.10). The effect of the carve-out is to require that a certain portion of the renewable energy required under the existing RPS be procured from a particular source (in this case, from customer-sited, biomass-fueled CHP facilities). Franklin concedes that the practical effect of the carve-out as applied today has the net result of limiting the CHP facilities to those in Franklin,

but asserts that the provision does not amount to a *per se* violation of the Commerce Clause because the significant state interests greatly outweigh the minor burdens on interstate commerce.

The local interest relevant to this issue are the same interests that Franklin has asserted in section III of this argument. In sum, those interest amount to the mitigation of an energy generation crisis in Franklin. Section 2(b) of the Act sets the procurement obligation for this particular category of sources at 0.5 percent beginning in 2020, and growing to 1.0 percent by 2030. (R.10). Incorporating the local benefits to be provided by the EDEA, Franklin asserts that the effect of the carve-out on interstate commerce is extremely small. Additionally, because the eligible CHP facilities are not limited to use of biomass from "designated certified biomass regions", the out-of-state biomass industry can reasonably be expected to gain from this modification. In EELI, the court found that EELI offered no story suggesting how Colorado's mandate disproportionately harms out-of-state business, finding that fossil fuel producers like EELI's members will be hurt, "but as far as we know, all fossil fuel producers in the area served by the grid will be hurt equally and all renewable energy produces in the area will be helped equally." *Id.* Exploiting dicta in Healy, EELI contended that the *Baldwin* and *New Jersey* lines of cases required the court to declare "automatically" unconstitutional any state regulation with the practical effect of controlling conduct beyond the boundaries of the State. *EELI*, at 1174. But, the Tenth Circuit found that Supreme Court's holdings have not gone nearly that far. The Supreme Court has emphasized that the *Baldwin* line of cases concerns only price control and price affirmation statutes. The Ninth Circuit has made the same point, too, explaining that "*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 'tie the price of its in-state products to out-of-state prices.'" *Id.*

Alternatively, in the event that the court determines that summary judgement was appropriate with regard to Section 2(b), the appellant asserts the EDEA is not as a whole invalid. The summary judgement standard was not appropriately applied by the District Court as to the provisions of Section 1, and subsection 2(a). Despite the fact that the provisions of subsections (a) and (b) are contained under Section 2; the provisions are different and function independently.

CONCLUSION

The EDEA was established for the purpose of regulating electrical production within the State of Franklin as complementary legislation to the FERC regulation over wholesale interstate electricity markets and to encourage development of reliable electricity for customers in the PJM. The Supremacy Clause of the Constitution does not preempt the State of Franklin from enacting this legislation because the EDEA does not have a direct effect on the FERC regulations and it does not inhibit the government from achieving the goals of the FPA. The EDEA also does not violate the dormant Commerce Clause on the Constitution as it does designate the biomass feedstock initiative in terms of state boundaries and it is not a per se violation of the Commerce Clause. Therefore, the State of Franklin hereby requests that the Appellate Court vacate the order granting summary judgment in favor of EPC and remand the case for a trial on the merits.

Brief Certificate of Compliance

Pursuant to *Official Rule* III.C.9, the State of Franklin certifies that its brief contains 28 pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No.* **_7__**, and the *Team Members* of *Team No*. **__7_** have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 7

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing the State of Franklin certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 13, 2017.

Respectfully submitted,

Team No. 7