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

BRIEF OF APPELLEE ELECTRICITY PRODUCERS COALITION

Team 9

FINAL BRIEF: February 13, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Franklin has subject matter jurisdiction over this matter under 28 U.S.C.S. § 1331, which provides for original jurisdiction over all civil actions arising under the Constitution or laws of the United States. On November 7, 2016, the U.S. District Court for the District of Franklin entered a final order granting Plaintiff-Appellee Electricity Producers Coalition's ("EPC") Motion for Summary Judgment. Defendant-Appellant State of Franklin ("Franklin") timely filed their appeal on December 6, 2016. This is an appeal from a final order granting Appellee's Motion for Summary Judgment that disposed of all parties' claims; appellate jurisdiction is conferred on this Court by 28 U.S.C.S. § 1291.

STATEMENT OF THE ISSUES

1. Whether Section 1 of Energy Diversification & Expansion Act ("EDEA"), as enacted by 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.

2. Whether 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.

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

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

STATEMENT OF THE CASE

I. Statement of Facts

The coal industry is Franklin's life-blood, which until recently provided a constant stream of power, employment opportunities, and tax revenues. As the third largest coal producer in the United States, Franklin has suffered dramatic declines in coal production due to the availability of cheaper natural gas for generating electricity and the increasing affordability of renewable energy resources like wind and utility-scale solar photovoltaics. Record at 3. Unsurprisingly, Franklin's electricity generation capacity is heavily reliant upon coal (82%), followed by natural gas (10%), wind (5%), biomass (2%), and solar photovoltaics (1%). R. at 3. The evolving market conditions could force the premature retirement of many of the coal plants in Franklin and stem the flow of revenues from the state coal severance tax, community property taxes, employment opportunities, and the continued production of coal within Franklin to meet the plants' fuel supply needs. R. at 3.

Franklin also happens to be the third most forested state in the nation, with 77% forest cover, including the Central Appalachian forest, a 422-acre forest entirely within Franklin, and the Franklin-Allegheny State Forest, a 756-acre forest encompassing both Franklin and the state of Vandalia. R. at 3. As a way to "creat[e] opportunities for employment in the energy sector," stabilize power prices, and ensure sufficient generation capacity, Franklin plans to use the by-products from forest harvesting and processing facilities to promote industrial scale production of biomass feedstock, both for co-firing with coal at electric generating plants and for biomass-fired small power production facilities. R. at 3-4.

In January of 2016 Franklin enacted the Energy Diversification and Expansion Act ("EDEA") with intentions to bolster the economic viability of its failing coal fired power plants

and to foster the development of a local biomass feedstock production industry. R. at 3. The EDEA has three main elements:

> (1) creation of a financial incentive program in the form of Carbon Assistance Payments ("CAPS") to "eligible coal fired power plants" [EDEA, Section 1];
> (2) modification of Franklin's existing Renewable Portfolio Standard ("RPS")[1] to require electric distribution companies to obtain no less than 15%[2] of their fuel supply from plants that are co-fired with coal and "certified biomass feedstock" [EDEA, Section 2(a)]; and
> (3) modification of Franklin's RPS to require electric distribution companies to obtain 0.5-1.0% of fuel from customer-sited combined heat and power ("CHP") or cogeneration facilities fueled with biomass [EDEA, Section 2(b)].

R. at 3-4. The Act presents significant changes to Franklin's existing energy practices and policies that will ripple through the regional electricity market.

Franklin participates in a de-structured energy market; distributors purchase electricity from independent power generators through contracts and in the competitive wholesale markets overseen by PJM Interconnection ("PJM"), an Independent System Operator ("ISO") regulated by the Federal Energy Regulatory Commission ("FERC"). R. at 5. PJM serves all or parts of 13 mid-Atlantic and Midwestern states and the District of Columbia and balances the generation supply and demand across the area by dividing them into 21 submarkets known as local marginal pricing zones ("LMPs"). R. at 5. LMPs use market-based prices that reflect the relative generation capacity (supply) and loads (demand) within a particular geographic area, given

[1] A Renewable Portfolio Standard (RPS) or Renewable Energy Standard typically requires utilities selling electricity to end-use customers to generate or purchase a specific percentage of its electricity supply from renewable sources. If a seller fails to procure sufficient renewable energy, it must pay penalties. R. at 3.
[2] As measured by heat content in British thermal units ("BTUs").

transmission constraints.[3] R. at 5. Three LMPs are located within Franklin: Franklin East, located entirely within the state; Vandalia South, located one quarter in Franklin with the remainder occupying the state of Vandalia; and Allegheny North, located one third in Franklin with the remainder occupying the neighboring state of Allegheny. R. at 6.

The Franklin Public Service Commission ("PSC"), has primary authority over administration of the existing RPS and the new CAP program in a manner consistent with the objectives set forth in the EDEA preamble of preserving the economic viability of existing coal-fired generation and stimulating the development of a biomass industry. R. at 3-4, 6, 8. After three months of workshops and an expedited informal rulemaking process, the PSC issued its EDEA Implementation Order in June 2016 that established a ten-year contract period, beginning on September 1, 2016, for five "eligible coal-fired generating plants" offering capacity to the PJM, one of which was located in the Vandalia South zone outside the state. R. at 7. The PSC determined that the CAP was to be set at $18.50 per megawatt hour, based in part on relative capacity bids in the PJM market. R. at 7-8.

The Franklin Department of Natural Resources ("DNR"), and the Franklin Division of Commerce ("FDC") were tasked with determining eligible sources of "certified biomass feedstock" for the new RPS requirements. R. at 8. The RPS first enacted in 2007 required the five electric distribution companies operating within Franklin to secure 20% of the electricity sold to retail customers within Franklin from solar, wind, geothermal, biomass, and small-scale or run-of-river hydro sources by 2020, increasing to 30% by 2030. In addition, the EDEA requires a 15% reduction in Franklin's 82% reliance on coal, meaning that a minimum of 12.3%

[3] For example, "relative prices prevailing in the LMP zones can be used as a rough indicator of locations where additional transmission infrastructure (or, in the absence of that, additional generation capacity) may be necessary." R. at 6.

of the Franklin's energy must be generated from "certified biomass feedstock." R. at 8. The DNR and FDC released the Biomass Eligibility Determination Order in June 2016 with their findings, following those three months of workshops and an expedited informal rulemaking process, that the Franklin-Allegheny State Forest and the Central Appalachian Forest qualify as "Designated Biomass Growing Regions" for the production of "certified biomass feedstock." R. at 9. The determinations were based upon both the quality, suitability, and sustainability of forest biomass and the area's labor and employment trends, unemployment rates, average income, and such other factors as the agencies deemed reasonable. R. at 9. Additionally, the effect of the carve-out for CHP facilities, 0.5 % beginning in 2020 (1.0 % by 2030) of the renewable energy required under the existing RPS must be procured from in-state facilities burning any type of biomass. R. at 10.

II. Procedural Background

The Electricity Producers Coalition ("EPC") challenged the constitutionality of the EDEA in the Federal District Court for the District of Franklin on July 1, 2016. R. at 12. 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 RPS violate the Dormant Commerce Clause of the U.S. Constitution given their discriminatory impact on interstate commerce, as well as injunctive relief to prevent the implementation of the EDEA on September 1, 2016 until the issues could be resolved in court. R. at 12.

Both EPC and the State of Franklin filed Motions for Summary Judgement. R. at 12. On November 7, 2016, the District Court granted EPC's motion. R. at 12-13. The Court based its decision on four findings: that the EDEA was (1) "field preempted" and (2) "conflict preempted"

under the Supremacy Clause because it interfered with FERC's exclusive jurisdiction over wholesale power markets, that the RPS requirements are invalid under the Dormant Commerce Clause because the geographic limitations in 'certifying' biomass are (3) impermissibly discriminatory in effect, and the CHP requirement is (4) facially discriminatory because it excludes the participation of energy providers outside of the state of Franklin.

On December 6, 2016, Franklin filed a timely appeal with the Court of Appeals for the Twelfth Circuit, denying that the EDEA violates the Supremacy Clause and the Dormant Commerce Clause. R. at 13. On January 6, 2017, the Twelfth District Court ordered both parties brief the above issues. R. at 14.

SUMMARY OF THE ARGUMENT

The EDEA as enacted is unconstitutional; it violates both the Supremacy Clause and the dormant Commerce Clause of the United States Constitution.

The Supremacy Clause cases have established three types of preemption: explicit, field, and actual conflict. In the case at bar, the EDEA is both field preempted and conflict preempted by the Federal Power Act ("FPA") under the Supremacy Clause. Through the FPA, Federal Energy Regulatory Commission ("FERC") has the sole authority to regulate interstate transmission and wholesale energy sales. The FPA sets rates, determines licenses, and controls market entry at the wholesale level, but explicitly leaves the local distribution and market control to the states. Franklin argues that the EDEA is in within the state's authority to account for deficiencies within its borders, but the effect the effect of the CAP program is far broader than what is allowed by the FPA. Through the CAP program, the PSC is first attempting to set wholesale prices for coal fired generators, one of which is located outside the state of Franklin.

Second, the CAP program offers higher than market prices for capacity when generators sell to PJM, which is unconstitutional interference with FERC's control over interstate power generation and transport.

The EDEA is also conflict preempted by the FPA. The FERC has established that it will uphold its mandate of controlling energy costs through market based processes, and has promulgated regulations to that effect. The EDEA attempts to interferes with that process the CAP program because it sets above market rates for certain coal fired generators serving Franklin, which in turn directly interferes with the market signals FERC employs to control costs and undermines PJM's competitive auction process.

Preemption issues aside, the EDEA also violates the dormant Commerce Clause by stemming the free flow of interstate commerce. The Federal Power Act's "savings clause," 16 U.S.C.S. § 824(b)(1), does not convey Congressional intent to exempt or alter the limits of state power under the Commerce Clause. Neither is Franklin allowed to claim a market-participant exception because it is not selling or purchasing goods or services in the same way that a private entity would. Franklin's Act is *per se* invalid because it discriminates against interstate commerce in favor of local business to serve a purely economically protectionist purpose. Franklin's in-state "carve-outs" are facially discriminatory while its certification requirements are effectively discriminatory. Franklin offers no evidence of exploring valid, alternative means to reach its stated goals of resiliency and cost-reduction. Instead, the record shows that its primary motivation is to preserve employment opportunities for its waning coal-industry employees by reserving market-share for private in-state businesses. These types of state laws violate the dormant Commerce Clause's fundamental purpose of establishing a national market

free of preferential advantages based simply upon regional origins. The Supreme Court consistently holds that laws like the EDEA are explicitly prohibited.

ARGUMENT

I. STANDARD OF REVIEW

A Court of Appeals reviews *de novo* the district court's granting of summary judgment. *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1086 (9th Cir. 2013). Summary judgment is appropriate only where the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A district court's resolution of federal constitutional claims is also reviewed *de novo. Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1229 (9th Cir. 2010).

II. THE DISTRICT COURT CORRECTLY HELD THAT FRANKLIN'S ENERGY ACT IS PREEMPTED BY THE FEDERAL POWER ACT UNDER THE SUPREMACY CLAUSE.

The EDEA is invalid because it unconstitutionally attempts to regulate sale of power in the wholesale market, a field Congress exclusively granted to the FERC through the Federal Power Act. *See generally* 16 U.S.C.S. § 824. The EDEA's CAP program attempts to control wholesale energy prices by offering carbon assistance payments to plants that serve the state of Franklin, provided that those plants sell their capacity to PJM Interconnection. R. at 7. While the EDEA intended to protect power prices in Franklin, assist the struggling Franklin coal plants, and ensure the availability of reliable, inexpensive electricity in the state, it actually interferes with PJM's wholesale market by undermining their capacity bids by offering an extra rate to coal fired plants. Those bids are designed by FERC to help ensure that "the transmission or sale of

electric energy … be just and reasonable," and the extra price Franklin offers for coal fired electricity interferes with that goal. 16 U.S.C.S. § 824(d).

The Constitution holds that valid federal laws "shall be the Supreme Law of the Land" and that state laws cannot "impede, burden, or in any way control operations of valid laws enacted by Congress." U.S. Const. art. VI, cl. 2. The Courts have traditionally held that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 543 (2008). The purpose of Congress in passing the FPA and establishing the FERC was to ensure that "all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy" in interstate commerce "be just and reasonable."16 U.S.C.S. § 824(d). In passing the EDEA, Franklin has crossed into the jurisdiction of the FPA by offering an unjust, above-market rate for coal fired generation, and therefore conflicts with the Federal Power Act.

While the Supreme Court has found that "there can be no one crystal clear distinctly marked formula" for preemption, it has found three circumstances in which federal law overrides state law. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941). First, a state law is preempted when it actually conflicts with Federal law; also known as conflict preemption. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990). Second, Congress can "explicitly define the extent to which its enactments preempt state law." *Id*. Third,"state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id*. This applies when (1) the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or (2) federal interest in a field is so prevailing that the "federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa*

Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). This is known as field preemption.

A. THE EDEA CAP PROGRAM IS FIELD PREEMPTED BECAUSE IT INTERFERES WITH FERC'S EXCLUSIVE JURISDICTION.

i. The CAP Program Is Preempted Because The FPA Leaves No Room For The States To Supplement The Regulation Of Wholesale Power Sales.

The FPA grants the FERC authority over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C.S. § 824. However, the FPA stresses that the FERC's jurisdiction over wholesale energy sales and interstate transmission only extends to matters "not subject to regulation by the states." *Id*. The FERC's lack of authority with respect to "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter," stating that those areas are not subject to regulation under the FPA. 16 U.S.C.S. § 824. This language, and the broader language of the Federal Power Act, evinces that Congress intended to "occupy the field" of "the sale of such energy at wholesale in interstate commerce," which the EDEA unconstitutionally attempts to interfere with through its extra market payments. *Pennsylvania v. Nelson*, 350 U.S. 497, 504, 76 S. Ct. 477, 481 (1956); 16 U.S.C.S. § 824. The Courts have similarly recognized the FPA's dominance in the field. In *Jersey Cent. Power & Light Co. v. Fed. Power Com*., the Third Circuit recognized Congressional intent with respect to public utilities regulated under the FPA, holding that "Congress intended to impose regulation upon those public utilities which operate facilities for the transmission of electricity in interstate commerce." 129 F.2d 183, 195 (3d Cir. 1942). In West Virginia, the court recognized the FPA's dominance over wholesale electricity sales, finding that "in enacting the Federal Power Act" Congress "provided a complete scheme of

regulation of facilities" that the states "cannot by statute or otherwise interfere therewith," echoing the standard for field preemption established in *Rice*. *Appalachian Power Co. v. Pub. Serv. Com.*, 630 F. Supp. 656, 663 (S.D. W. Va. 1986); *Rice*, 331 U.S. 218, 67 S. Ct. 1146 ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." quoting *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919).

The EDEA's CAP program unconstitutionally attempts to regulate a field which "Congress has marked out for comprehensive and exclusive federal control," by attempting to control the distribution of the five coal fired plants' capacity through its CAP program. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 511-12, 109 S. Ct. 1262, 1275 (1989). The CAP program offers "financial incentives" in the form of an $18.50/MWh payment to generators, with the stipulation that they must offer capacity to PJM interconnection. R. at 7. Essentially, these payments "crossed the dividing line so carefully drawn by Congress" over into the federally controlled wholesale electricity market. *Nw. Cent. Pipeline Corp.*, 489 U.S. 493, 109 S. Ct. 1262. Because the EDEA, through the CAP program, attempts to regulate an area under federal jurisdiction, it is field preempted and unconstitutional.

ii. The CAP Program Is Preempted Because The Federal Interest Is Prevailing With Respect To Regulating Wholesale Power Sales.

In *Hines v Davidowitz*, the Supreme Court considered three criteria when analyzing field preemption under the prevailing federal interest analysis discussed under *Rice*. 312 U.S. 52, 70 (1941); *Rice*, 331 U.S. 218, 67 S. Ct. 1146. The court considered the "nature of the power exerted by Congress," the "object sought to be obtained," and the "character of obligations imposed by law" to determine whether federal laws preclude state laws on the same subject.

Hines, 312 U.S. 52. First, Congress's exertion of authority over interstate wholesale power sales has been recognized numerous times by the courts. *See Jersey Cent. Power* 129 F.2d 183 (Upholding Congress's intent to control interstate power transmission); *Appalachian Power Co.*, 630 F. Supp. 656 (4th Cir. 1987) (Upholding FPA's control over wholesale power sales); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014)("the Federal Power Act grants FERC exclusive control over whether interstate rates are "just and reasonable"). The FPA's declaration of policy states that "transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," and that "part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest," establishing Congress's intent to protect the public interest in maintaining electricity rates that are "just and reasonable." 16 U.S.C.S. § 824; 16 U.S.C.S. § 824(d). The "character and obligations imposed" by the FPA for the purposes of this case are the controls the FPA maintains over the wholesale sale of power in interstate commerce. *Hines*, 312 U.S. 52. The FERC sets rates, prevents fraud, investigates price setting, and a whole host of other duties related to the regulation of interstate transmission of electrical energy and the sale of energy at wholesale. 16 U.S.C.S. § 824(e). All of these considerations lend themselves to the conclusion that Congress intended for the Federal Power Act to prevail over state laws when they touched on the same subject. In the case at bar, the EDEA is attempting to regulate interstate sales of wholesale power, and in doing so is overlapping into territory exclusively occupied by the FPA. Based on this, the EDEA is field preempted, and is therefore unconstitutional and should be overturned.

B. THE EDEA CAP PROGRAM IS CONFLICT PREEMPTED BECAUSE IT DIRECTLY INTERFERES WITH FEDERAL LAW REGULATING ENERGY PRICES.

The EDEA CAP program is also invalid because it directly conflicts with FERC's regulatory scheme. The Supreme Court has established a principal test for determining conflict preemption: whether, "under the circumstances of [a] particular case" a law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. 52. FERC is statutorily mandated, through the FPA, to ensure that "rates and charges made, demanded, or received … [be] just and reasonable." 16 U.S.C.S. § 824(d). The FERC has determined that the most efficient way to preserve just and reasonable rates is through market based processes. 16 U.S.C.S. § 824(d); *See also* 72 FR 39904 (2007 rulemaking amending regulations to FERC's market based rules); 119 FERC 61295 (Upholding PJM's utilization of a Reliability Pricing Model (RPM) as a "just and reasonable method" of controlling power costs and demand); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) (Upholding FERC's authority to review a rate for reasonableness following a contract).

Interstate wholesale transactions in deregulated markets like Franklin's typically occur through two mechanisms. The first is bilateral contracting, where distributor's agreements with generators to purchase a certain amount of electricity at a certain rate over a period of time ranging from many years to just a single hour. The second is a wholesale market, like the PJM, where sales are all short-term, typically for a single hour. R. at 11. FERC's market based rate system has gone through several evolutions and challenges. 119 FERC 61295. Beginning with simply reviewing ad-hoc requests for market based rate authority, 2004 saw the development of a full-fledged market based system. 119 FERC 61295; 107 FERC 61019. In 2007, FERC further expanded its reliance on market based processes. 119 FERC 61295. In *Mont. Consumer*

Counsel v FERC, the 3rd Circuit upheld FERC's statutory discretion in using market based processes to control wholesale electricity prices, holding that market based prices do not violate the FPA. 659 F.3d 910, 914 (9th Cir. 2011).

The EDEA directly conflicts with FERC's jurisdiction over wholesale energy markets because it interferes with the market competition system that FERC and PJM use to control power generation costs. *See* 119 FERC 61295. The contracts created under Franklin's CAPs program are not the traditional bilateral contracts transferring ownership of capacity between parties outside the auction; instead they operate within the auction because the CAP payments are partially based upon the "relative bids for capacity bid into the PJM capacity markets." R. at 7. The CAPs essentially lower a plant's operating costs and thereby allows them to enter lower bids into the PJM. In doing so Franklin "attempts to second-guess the reasonableness of interstate wholesale rates," and sidesteps FERC's rate-reasonableness review. *Hughes*, 136 S. Ct. 1288.

The Supreme Court has recognized conflict between state and federal laws when said laws cannot "move freely within the orbits of their respective purposes without impinging upon one another." *Hill v. Florida*, 325 U.S. 538, 543 (1945). The conflict in the instant case is of the exact kind that the Supreme Court sought to prevent. The CAP program cannot offer payments to generation plants, provided they sell to PJM, without crossing into the jurisdiction of the FERC. Other cases reflect the "bright line between state and federal regulatory jurisdiction under the Federal Power Act." *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 371 (1988)(quoting *Nantahala*, 476 U.S., at 961). *Nantahala* found that a state, in setting retail rates did not have "license to ignore the limitations that FERC has placed upon" it with respect to wholesale rates. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986). *Miss.*

Power found that "states may not … substitut[e] their own determinations of what would be just and fair," which is precisely what the EDEA attempted to do with its CAP program. *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 371 (1988).

Franklin argues that the EDEA attempts to ensure "a reliable and reasonably priced electricity supply" by offering financial incentives to eligible coal fired plants serving Franklin, ostensibly to combat the "loss of significant electrical generation capacity" in the mid-Atlantic region due to retiring of coal fired plants. R. at 4. But this does not save the EDEA because "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Hughes v. Talen*, 136 S. Ct. at 1298. Therefore, the EDEA's CAP program must be rejected "because it disregards an interstate wholesale rate required by FERC." *Id* at 1299.

III. THE DISTRICT COURT CORRECTLY HELD THAT FRANKLIN'S ENERGY ACT VIOLATES THE DORMANT COMMERCE CLAUSE.

Franklin's EDEA is also invalid on the grounds that it violates the dormant Commerce Clause.[4] Commerce Clause cases implicating the Federal Power Act[5] are subject to "scrutiny on the merits." *Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992)(quoting *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 455 (1982)).

---

[4] A conclusion by the Court that the Federal Power Act preempts the EDEA would render a determination on the dormant Commerce Clause arguments unnecessary. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 311 (1988)("Because we have concluded that Act 144 is pre-empted by the NGA, we need not decide whether, absent federal occupation of the field, Act 144 violates the Commerce Clause.").

[5] The clause "saving" states' jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U. S. C. § 824(b)(1)

Congress has the power "to regulate Commerce . . . among the several States . . ." U.S. Const. art. I, § 8, cl. 3. The corollary, known as the Dormant Commerce Clause, is that states are restricted from regulating interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). In fact, the Dormant Commerce Clause's fundamental purpose is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *G.M.C. v. Tracey*, 519 U.S. 278, 299 (1997). Therefore, "state or municipal laws whose object is local economic protectionism" are prohibited. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)(citing The Federalist No. 22, pp. 143-145 (C. Rossiter ed. 1961)(A. Hamilton)). In almost every circumstance, the Supreme Court holds that discriminatory laws – those that create "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" – are invalid. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 338 (2007)(*United Haulers*). Those laws violate the principles behind the Dormant Commerce Clause by "depriv[ing] citizens of their right to have access to the markets of other States on equal terms." *Granholm v. Heald*, 544 U.S. 460, 473 (2005). The few exceptions to the Dormant Commerce Clause rule occurs when a state can show that it "regulates evenhandedly to effectuate a legitimate local public interest." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Then the court must analyze the extent of the burden and "whether [the public interest] could be promoted as well with a lesser impact on interstate activities." *Id*.

A. FRANKLIN'S EDEA IMPERMISSIBLY DISCRIMINATES AGAINST OUT-OF-STATE BIOMASS FEEDSTOCK PRODUCERS.

The District Court correctly found that the geographic limitations created by the EDEA impermissibly discriminate against out-of-state biomass feedstock producers, and therefore burdens interstate commerce. On its face and in practical effect, EDEA discriminates against

interstate commerce by requiring generators to choose origin-specific biomass in order to gain access to their energy distribution market. More specifically, Section 2(a) of the Act created a biomass certification standard partially based on the regional economic performance, and effectively reserves approximately 12% of Franklin's electricity market to generators using Franklin's "certified" biomass. Section 2(b) carves out an additional RPS percentage of 0.5-1.0% for energy generated by combined heat and power (CHP) or cogeneration facilities located in Franklin and fueled with any type of biomass feedstock.

When a law facially discriminates against interstate commerce it is subject to strict scrutiny – a "virtually *per se* rule of invalidity." *Philadelphia*, 437 U.S. at 624. Requirements that economic activity take place in-state, while excluding out-of-state sources of the same activity, are routinely invalidated under the Dormant Commerce Clause. *E.g., Pike v. Bruce* Church, 397 U.S. 137 (1970)(striking down a state statute requiring business operations to be performed in the home state before export);*New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982)(striking down a New Hampshire law prohibiting a utility from exporting hydropower generated in New Hampshire to other states). Laws that expressly mandate differential treatment through excessive taxes or price setting are also deemed facially discriminatory. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988)(striking down an Ohio law that offered a tax credit to fuel sellers for selling ethanol produced in Ohio); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935) (striking down New York law that prohibited the sale of milk unless the price paid to the original milk producer equaled the minimum required by New York).

States may regulate in favor of state-owned entities and face less than strict scrutiny, so long as regulations are not aimed at economic protectionism. *See United Haulers*, 550 U.S. at

343. A state is free to favor in-state projects when the state is selling or purchasing goods or services in the same way that a private business would – known as the market-participant exception. *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 809 (1976)(upholding a Maryland law requiring a processor to submit proof of Maryland titling for abandoned hulks to receive a bounty did not restrict operation of a free market); *Reeves, Inc., v. Stake, et al.*, 447 U.S. 429 (1980)(upholding a policy that restricted out-of-state sales by a State-owned cement factory during shortages). But states may not use laws to favor *private* market participants just because they use state property or perform state functions. *See C&A Carbone*, 511 U.S. at 394.

The Supreme Court struck down a similarly preferential Oklahoma law that required ten percent of electric utilities' coal purchases to be from in-state suppliers, stating that "such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Wyoming*, 502 U.S. at 455The Court further noted that "the volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id*. More recently, Michigan passed an RPS that could only be satisfied using generators located in Michigan; the law was struck down because "a state cannot, without violating the Commerce Clause, discriminate against out-of state renewable energy." *Illinois Commerce Com'n v. Federal Energy Regulatory Com'n*, 721 F.3d 764 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

The discriminatory nature of Sections 2(a) and 2(b) are overwhelmingly sufficient to conclude that the EDEA is unconstitutional. Franklin's modification of its RPS to include requirements that only privately run in-state sources can satisfy is a tried-and-true example of the state restricting the operation of the market. Biomass feedstock sources may only be "certified"

after Franklin Division of Commerce analyzes the local labor and employment trends of the region where the biomass is produced. EDEA, Section 2(a)(4). The resulting certified sites – Franklin-Alleghany State Forest and Central Appalachian Forest – are, predictably, predominantly within the boundaries of Franklin. R.at 9. Presumably, any out-state biomass feedstock producer, where the FDC will be unable to analyze the unemployment rates and average incomes, will fail the second part of Franklin's certification requirements; and thus, their entry into Franklin's biomass feedstock market is barred. Should that approach fail to bolster the local economies of those areas, Franklin put in place a carve-out for distributed energy facilities based in-state.

In *Wyoming*, the Court also rejected Oklahoma's argument that discrimination against out-of-state coal was justified because it had a presumably legitimate goal of "sustaining the Oklahoma coal-mining industry lessens the State's reliance on a single source of coal delivered over a single rail line." *Id* at 457 (citing *Baldwin*, 294 U.S. 511). Likewise, Franklin attempts to achieve the goal of economic rejuvenation by "the illegitimate means of isolating the State from the national economy." *Id*. Franklin insists that it discriminates in order "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." R. at 14. However, "a state may only distinguish products from different regions if there is "'some reason, apart from their origin, to treat then differently." *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013)(quoting *Philadelphia*, 437 U.S. 617, 627 (1978)). For example, the Ninth Circuit held that the use of regional categories to assess carbon intensity, including explicit reference to California's geopolitical borders, did not

constitute facial discrimination because ethanol from every regional category is effectively treated the same under the regulation. *Id*. at 1090.

Franklin did not express a legitimate reason to distinguish between the suitability of in-state and out-of-state biomass feedstock sources. Yet the language of the EDEA's Preamble points to why Franklin decided to have the FDC participate in the biomass certification process. Among Franklin's many expressed purposes are "to support economic growth and expanded employment opportunities for its citizens" (EDEA Preamble, para. i.),"to diversify its economy by taking advantage of the opportunities associated with the sustainable harvesting of its biomass resources" (para. vii), and to "creat[e] opportunities for employment in the energy sector in Franklin" (para. viii.). Governor Carbon also issued a statement supporting the EDEA as "necessary and vital support for the coal miners in Franklin." R. at 5. Somehow Franklin implicitly and incorrectly presupposes that Franklin Division of Commerce's assessment of regional unemployment rates and incomes can distinguish between suitable and unsuitable sources of "certified biomass feedstock" for use by electricity generators selling into the PJM. *See* EDEA, Section 2(a)(4). Objectively, unemployment rates are irrelevant in determining the quality of biomass feedstock. The U.S. Department of Energy's Office of Energy Efficiency & Renewable Energy's Biomass Feedstocks webpage offers information on suitable sources, yet makes no reference to regional economics in its discussion of potential biomass feedstock qualities. *See generally* Office of Energy Efficiency & Renewable Energy, *Biomass Feedstocks*, last accessed February 11, 2017, *available at* https://energy.gov/eere/bioenergy/biomass-feedstocks. Here, the District Court correctly concluded that the EDEA as implemented by the State of Franklin and its agencies is unconstitutional because "by itself, of course, revenue

generation is not a local interest that can justify discrimination against interstate commerce." *C&A Carbone*, 511 U.S. at 393.

B. FRANKLIN FAILED TO PROVE THAT IT HAS NO NON-DISCRIMINATORY MEANS FOR ACHIEVING ITS ENDS.

The EDEA fails because it effectively requires electric distribution and generation utilities to favor private, Franklin-based biomass feedstock producers. When a law is discriminatory, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986)(quoting *Hughes* v. *Oklahoma*, 441 U.S. at 336)(upholding Maine's ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species).

Franklin asserts that nothing in the Dormant Commerce Clause prohibits states from encouraging the procurement of environmentally beneficial resources. This is correct. However, this position is a *non sequitur* from the case before the Court. The issue here is not whether states may encourage such activity; it is whether states can enact a law that favors in-state sourcing by private electricity generators, and for the reasons discussed above the answer is "No." Approximately 29 other states have found ways to mandate a greater electricity market share to renewable energy resources without sequestering out-of-state competition. *See* United States Department of Energy Database of State Incentives for Renewables and Efficiency ("DSIRE"), DSIRE Summary Tables: Renewable Portfolio Standards (February 11, 2017), *available at*: http://programs.dsireusa.org/system/program?type=38&. For example, the creation of a secondary Renewable Energy Credit market to incentivize production and distribution of electricity using biomass feedstock. The District Court properly granted EPC's Motion for

Summary Judgment because it correctly identified and applied this standard of review in finding the Act unconstitutional under the Dormant Commerce Clause.

IV. CONCLUSION

For the reasons provided above, Appellee respectfully requests that this Court affirm the holding of the U.S. District Court for the Eastern District of Franklin and find that the Energy Diversification and Expansion Act is preempted by the Federal Power Act under the Supremacy Clause and violates the Dormant Commerce Clause, and is therefore invalid.

Certificate of Service

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

Respectfully submitted,

Team No. 9