IN THE UNITED STATES COURT OF APPEALS FOR THE

TWELFTH CIRCUIT

	)	
	)	
	)	
STATE OF FRANKLIN, *Appellant,*	)	
	)	Case No. 16-01234
v.	)	
	)	
	)	
ELECTRICITY PRODUCERS COALITION, *Appellee.*	)	
	)	
	)	

On appeal from the
United States District Court for the
Eastern District of Franklin

BRIEF FOR THE APPELLANT

TEAM 18

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. SECTION 1 OF THE EDEA IS NOT "FIELD PREEMPTED" UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT REGULATE THE SALE OF ELECTRIC ENERGY AND THE SALE OF CAPACITY AT WHOLESALE IN INTERSTATE COMMERCE……………………………………………………………9

A. The CAP Program administered under Section 1 of the EDEA does not interfere with wholesale power markets, and therefore is not in the same regulatory field as the FPA. 11

B. The CAP Program will decrease, not increase, the price of electricity from the generators.. 13

II. SECTION 1 OF THE EDEA IS NOT CONFLICT PREEMPTED UNDER THE SUPREMACY CLAUSE BECAUSE COMPLIANCE WITH BOTH STATE AND FEDERAL LAWS IS NOT IMPOSSIBLE AND THE STATE LAW IS NOT INCONSISTENT WITH THE PURPOSES AND OBJECTIVES OF THE FPA………15

A. Simultaneous compliance with the EDEA and the FPA is not impossible. 17

B. The EDEA is not inconsistent with the purposes and objectives of the FPA, which are to provide low-cost and efficient power to consumers. 17

III. SECTION 2(A) OF THE EDEA IS NOT INVALID UNDER THE DORMANT COMMERCE CLAUSE BECAUSE IT NEITHER IS FACIALLY DISCRIMINATORY NOR CREATES AN UNDUE BURDEN ON INTERSTATE COMMERCE…………19

A. Section 2(a) of the EDEA does not facially limit interstate commerce because nothing on the face of the document prohibits commerce with out-of-state market participants. 20

B. Section 2(a) of the EDEA is not, in effect, unduly burdensome on interstate commerce because there is a minimal, incidental burden placed on interstate commerce that is justified by a public interest and cannot be achieved by a different, less burdensome alternative. 21

IV. THE COMBINED HEAT AND POWER CARVE-OUT OF SECTION 2(B) DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE THE BENEFITS OF ENERGY INDEPENDENCE, GREENHOUSE GAS EMISSIONS REDUCTION, AND IMPROVEMENTS TO THE LOCAL ECONOMY ARE LEGITIMATE INTERESTS OF THE STATE OF FRANKLIN WHICH OUTWEIGH THE MINIMAL BURDEN ON INTERSTATE COMMERCE………………………………………………………...24

A. The environmental benefits of utilizing CHP facilities. 25

B. Section 2(b) does not discriminate against interstate commerce in violation of the dormant Commerce Clause because the effects are merely incidental. 25

i. Section 2(b) does not facially discriminate or discriminate-in-effect against interstate commerce because it does not limit where the biomass used in the CHP facilities is derived.. 26

C. Franklin's legitimate purposes for promulgating Section 2(b) are to comply with stricter federal standards that emphasize greater energy independence and to ensure that, as the coal powered economy is pushed out, Franklin's economy and people will remain afloat… 27

D. Section 2(b)'s carve-out for cogeneration facilities in Franklin relates to the reasonable purpose of environmental sustainability and strengthening the electric grid for the safety of the people of Franklin. 28

E. Franklin's reasoning for passing EDEA Section 2(b) outweighs the burden on interstate commerce because the burden is merely incidental and does not have a great impact on out-of-state electricity producers. 28

CONCLUSION.. 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983) 28
C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 26
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981)... 27
Cooley v. Bd. of Wardens, 53 U.S. 299 (1852)... 19
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)... 20, 21
Dep't of Revenue of Ky. v. Davis, 553 U.S. 328 (2008) 29
Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).. 16
Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)... 10, 16
Gibbons v. Odgen, 22 U.S. 1 (1824).. 19
Hines v. Davidowitz, 312 U.S. 52 (1941) 10, 16
Hughes v. Oklahoma, 441 U.S. 322 (1979) 20, 24
Hunt v. Wash. Apple Adver. Comm'n, 432 U.S. 333 (1977) 27
Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981)... 20
McDermott v. Wisconsin, 228 U.S. 115 (1913) 16
Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354 (1988)....................................... 12
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 11
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 11, 17
Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994) 26
Pacific Gas & Electric Co. v. State Energy Comm'n, 461 U.S. 190 (1983) 16
Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 28
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 20, 21, 26, 29
Pullman Standard v. Swint, 456 U.S. 273 (1982)... 9
United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007)....... 28

United States Courts of Appeals

Crossroads Cogeneration Corp. v. Orange & Rockland Utils., 159 F.3d 129 (3d Cir. 1998)..... 28
Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) 23
Freehold Cogeneration Assoc. v. Bd. of Reg. Comm'rs of N.J., 44 F.3d 1178 (3d Cir. 1995)..... 28
Grand River Enterprises Six Nations, Ltd. v. Beebe, 574 F.3d 929 (8th Cir. 2009).................... 26
Nat. Elec. Mfrs Ass'n v. Sorrell, 272 F.3d 104 (2nd Cir. 2001) 29
PPL Energy Plus, LLC v. Nazarian, 753 F.3d 467 (4th Cir. 2014)... 12
PPL Energy Plus LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014).. 12
Southern Union Co. v. Missouri Pub. Serv. Comm'n, 289 F.3d 503 (8th Cir. 2002).................. 28

Statutes

16 U.S.C. § 823a *et seq*.. 28
16 U.S.C. § 824a-3(a) 28
28 U.S.C. § 1291.. 1
28 U.S.C. § 1331.. 1

Other Authorities

ENVTL. PROT. AGENCY, *Combined Heat and Power (CHP) Partnership, What is CHP?* (2016), https://www.epa.gov/chp/what-chp 25
Steven Ferraina, *Combined Heat and Power: A Technology Whose Time Has Come,* 32 UCLA J. ENVTL. L. & POL'Y 160, 162 (2014) 26

Constitutional Provisions

U.S. CONST. art. I, § 8, cl. 3 19
U.S. CONST. art. VI, § 2 10

JURISDICTIONAL STATEMENT

Subject matter jurisdiction of the District Court was conferred by 28 U.S.C. § 1331, which provides for original jurisdiction over all civil actions arising under the Constitution or laws of the United States. Appellate jurisdiction is conferred on this Court by 28 U.S.C. § 1291, which allows for jurisdiction over appeals from final decisions of the district courts of the United States. On November 7, 2016, the U.S. District Court for the Eastern District of Franklin granted Electricity Producers Coalition's motion for summary judgment. Appellants filed their timely notice of appeal on December 6, 2016 with the Twelfth Circuit Court of Appeals. This appeal is from a final judgment of the District Court.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in invalidating Section 1 of Energy Diversification and Expansion Act ("EDEA") as "field preempted" under the Supremacy Clause of the U.S. Constitution by finding that the CAP Program would interfere with wholesale power markets, over which the Federal Energy Regulatory Commission has exclusive jurisdiction under the Federal Power Act.
2. Whether the District Court erred in invalidating Section 1 of the EDEA as "conflict preempted" under the Supremacy Clause by finding that the CAP Program would interfere with the "market-based processes" approach to energy regulation approved and overseen by the Federal Energy Regulatory Commission.
3. Whether the District Court erred in finding that Section 2(a) of the EDEA was invalid under the dormant Commerce Clause due to the geographic limitation imposed in the requirement of "certified biomass feedstock" to areas primarily within the State of Franklin.

4. Whether Franklin presented a basis to justify the cogeneration facility carve-out in Section 2(b) of the EDEA which requires facilities to be located within the State of Franklin so as not to violate the dormant Commerce Clause.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court for the Eastern District of Franklin rendered on November 7, 2016 wherein the court granted the appellee Electric Producers Coalition's (EPC) motion for summary judgment on multiple grounds that the State of Franklin's Energy Diversification and Expansion Act was unconstitutional. R.12.

EPC commenced this action on July 1, 2016 seeking injunctive relief to prevent the EDEA from being implemented on September 1, 2016. R.12. EPC alleged that the CAP Program violates the Supremacy Clause because of both field and conflict preemption and that the adjustments to Franklin's RPS violate the dormant Commerce Clause because of their discriminatory impact on interstate commerce. R.12. Both parties filed cross-motions for summary judgment, R.12, and the court granted EPC's motion on November 7, 2016 on four separate issues. R.12.

First, the court held that Section 1 of the EDEA is field preempted under the Supremacy Clause of the U.S. Constitution because FERC has exclusive jurisdiction over the sale of electric energy and capacity at wholesale in interstate commerce. R.12-13. Second, the District Court held that Section 1 is also conflict preempted under the Supremacy Clause of the U.S. Constitution because the CAP program would interfere with market-signals, which could result in discouraging potential investors from financing and building new economic generation. R. 13.

Third, the District Court invalidated Section 2(a) under the dormant Commerce Clause because it found the term "certified biomass feedstock" limited procurement to areas primarily located within the State of Franklin, which discriminates against out-of-state biomass. R.10.

Finally, the District Court found that Section 2(b) was invalid under the dormant Commerce Clause because the limit of "eligible facilities" to only customer-sited generation connected to the grid serving retail customers within the State of Franklin interfered with interstate commerce without a sufficient basis on the part of Franklin to justify that interference. R.13.

The State of Franklin appeals to this Court, the United States Twelfth Circuit Court of Appeals, challenging the District Court of the State of Franklin's grant of summary judgment for PSC. R.13. The State asks this Court to reverse the District Court's decision.

STATEMENT OF THE FACTS

The State of Franklin enacted the Energy Diversification and Expansion Act ("EDEA") in 2016 in response to the decline of coal production in Franklin as a way to preserve the economic viability of the failing coal-fired generating plants and to assist in stimulating the new development of a biomass industry. R.3. The EDEA creates an initiative that both addresses the economic crisis within Franklin and improves environmental sustainability efforts throughout the State. R.3.

The electricity market in Franklin has competition at the retail level, pursuant to the Electric Customer Choice and Competition Act of 1996. R.5. Distribution facilities purchase electricity at wholesale from independent power producers either through bilateral contracts or competitive wholesale markets administered by nonprofit entities regulated by the Federal Energy Regulatory Commission ("FERC"), which they then sell to ratepayers. R.5. Franklin is located within the mid-Atlantic region, which is served by the PJM Interconnection ("PJM"), an Independent System Operator (ISO). R.5. PJM operates in 21 different locational marginal pricing ("LMP") zones, which are geographic areas where market-prices are used as indicators of the impact of transmission congestion. R.5. Three LMPs are relevant to this case because of their location in Franklin: Franklin East, an area entirely within Franklin; Vandalia South, approximately one-

quarter of which is in Franklin, with the remainder being in the adjoining state of Vandalia; and Allegheny North, approximately one-third of which is located in Franklin, with the remainder being in the adjoining state of Allegheny. R.6. Due to PJM's inability to incentivize, the State enacted EDEA to address the future potential issues imposed by the capacity problems. R.4.

Franklin is the third-largest coal producing state in the country and has suffered a substantial decline in its coal production in recent years, which has severely threatened the State's economy. R.3. At the time of EDEA's enactment, eighty-two percent of the State's electric generation was derived from coal. R.3. Large coal plants within Franklin were in financial distress due to both the changing market forces to use cheaper natural gas and renewable resources and more stringent environmental regulations imposed by the Environmental Protection Agency. R.3.

As coal production continues to decrease, the risk of Franklin not being able to sustain the power plants' fuel needs' increases. R.3. This decline in production imposes a loss of significant electric generation capacity within the entire mid-Atlantic region, thereby threatening future economic growth. R.4. This decline also threatens current and future employment opportunities for the citizens of Franklin who rely on jobs within the coal industry because the State's ability to retain industrial and manufacturing jobs will diminish. R.3. Furthermore, the risk of lost tax revenue from the coal severance tax and property taxes of the communities where the plants are located will negatively impact Franklin. R.3.

Franklin legislators turned to renewable energy sources to address the economic problems and to reduce the environmental impact of the State's electricity generation. R.4. In addition to ample coal resources, forests cover seventy-seven percent of Franklin. R.3. There are numerous benefits to using forest products to support a biomass industry, such as adding to the diversity in Franklin's renewable portfolio and helping to decrease the State's environmental impact. R.3. This

new biomass industry, along with the rejuvenation of the coal industry, could assist electric generating plants in producing much-needed electricity, which would subsequently help to stabilize Franklin's economic issues. R.3.

The State of Franklin's objective in enacting Section 1 of the EDEA is to preserve the economic viability of the large coal-fired generation industry while also stimulating the development of the sustainable biomass industry. R.3. The EDEA contains three key elements to reduce threats to achieve this interest: section 1 provides financial incentives through a Carbon Assistance Payments ("CAP") program for eligible coal-fired generating plants in Franklin, section 2(a) modifies Franklin's existing Renewable Portfolio Standard ("RPS") to impose a requirement that electric distribution companies produce a portion of their electricity from plants co-fired with coal and no less than fifteen percent "certified biomass," and section 2(b) modifies Franklin's RPS to include a carve-out for customer-sited combined heat and power ("CHP") facilities fueled with biomass. R.4.

Through the CAP program, Franklin can subsidize the cost of producing energy in "eligible coal-fired generating plants." R.6. A plant is eligible, as defined in Section 1(a)(6), if it is located within the Franklin East, Vandalia South, or Allegheny North LMPs, relies on coal as a primary fuel source (ten percent of which comes from Franklin), and needs financial assistance to sustain continued operations as determined by the Public Service Commission ("PSC"). R.3. The PSC is given the primary responsibility for administering the CAP program by identifying eligible generating plants and setting the level of payments in accordance with the EDEA provisions. R.3.

Eligible generating plant owners are approached by the State Energy Office ("SEO") and offered a ten-year contract to receive CAPs. R.7. The SEO would collect revenue from the profits of five electric distribution facilities, and this money would fund the subsidy that each eligible coal

plant receives. R.7. Generating plant owners can continue to charge market price, even though it may produce a lower-than-sustainable profit for its operation, because the subsidy will increase overall profits. R.7. The number of CAPs sold would be capped annually at a particular megawatt hour ("MWh") amount, and then the SEO would collect the revenue to fund the CAPs from the five electric distribution facilities based on a proportionality calculation. R.7. Then, the PSC can set the rates for each electric distribution facility to recover the cost of the CAP from the retail rates charged to electric customers in Franklin. R.7.

The PSC issued its EDEA Implementation Order in June 2016 which identified five eligible coal-fired generating plants—three in the Franklin East zone, one in the Vandalia South zone (outside of the State of Franklin), and one in the Allegheny North zone (within Franklin). R.7. The PSC set the CAP at $18.50 per MWh based on the Commission's analysis of the relative bids for capacity into the PJM market. R.7,8.

The other major component of the EDEA is the modification of the RPS in Section 2 which diversifies renewable resources and stabilizes the State's economy by encouraging the development of a new biomass industry. R.5,8. When Franklin enacted its RPS in 2007, it required the five electric distribution facilities in Franklin to obtain twenty percent of their electricity from a renewable energy source by 2020, increasing to thirty percent by 2030. R.8.

The EDEA assigns the PSC authority to make the necessary findings in order to implement changes to the RPS. R.8. Section 2(a) suggests that the modification of the existing RPS in Franklin requires electric distribution facilities to procure a certain percentage of electricity supply for retail customers within Franklin from electric generating plants that co-fire coal and no less than fifteen percent from certified biomass feedstock. R.8. Section 2(a) initializes procurement at three percent in 2020, increasing to five percent in 2030. R.8. In addition to creatively addressing environmental

sustainability problems, the implementation of Section 2(a) diversifies Franklin's economy by developing a biomass industry so utilities can comply with using certified biomass to generate electricity. R.5.

Section 2(a)(3) of the EDEA provides that "certified biomass feedstock" is harvested from forests identified by the Franklin Department of Natural Resources ("DNR") and Division of Commerce as a "Designated Biomass Growing Region." R.8. Additionally, the area needs to be determined by the Division of Commerce to be an economically-depressed area. R.9.

In January 2016, Franklin's DNR and Division of Commerce initiated a joint proceeding to implement the EDEA. R.9. Two designated biomass growing regions were identified: Franklin-Allegheny State Forest and Central Appalachian Forest. R.9. Both forests are located in areas with relatively high unemployment rates and contain the necessary hardwood and softwood species that are well-suited for biomass used to generate electricity. R.9. The Franklin-Allegheny State Forest is located in both Franklin and Vandalia, while Central Appalachian is located solely in Franklin. R.9.

The EDEA continues to diversify Franklin's use of renewable resources with the implementation of Section 2(b). This section modifies the RPS to include a carve out for customer-sited CHP, or cogeneration, facilities connected to the distribution grid servicing Franklin that are fueled with biomass. R.10. The carve-out requires that a certain portion of renewable energy within the RPS be procured by eligible customer-sited, biomass-fueled CHP facilities. R.10. Since the CHP facilities are on the buyer-side of the meter, eligible CHP facilities are only located within Franklin. R.10. The procurement obligation of such facilities would begin at one-half percent in 2020, grow to one percent in 2030, and continue to grow in the future. R.10. This carve-out, unlike

the procurement requirement for biomass that is co-fired with coal, does not require that the biomass be certified; it can come from anywhere in Franklin or outside of the state. R.10.

Franklin's legislature determined that incentivizing the development of distributed energy resources ("DER"s), such as the CHP specified in Section 2(b), can benefit Franklin's economy. R.5. The modification of the RPS to include this carve-out will help ensure sufficient capacity and assist in stabilizing power prices by increasing resiliency and energy efficiency of the electric utility grid, reducing transmission and distribution costs, and providing additional tools to allow customers to manage energy costs. R.5. Additionally, it will create future employment opportunities within the energy sector of Franklin. R.5. Ultimately, the sections of the EDEA encourage reducing the environmental impact of the energy industry while also fostering the economic growth in Franklin by stimulating the development of the biomass industry. R.10.

SUMMARY OF ARGUMENT

The District Court erred when it granted EPC's motion for summary judgment. The EDEA does not violate the Supremacy Clause because the CAP program operates independently from the PJM's capacity auction process and thus is not preempted by the Federal Power Act ("FPA"). Franklin's CAP program is simply a subsidy for select power generators to help them survive the threat of the shifting economy within the state. It does not affect the setting of wholesale prices nor does it interfere with the operation of competitive market forces under FERC's regulations. The State denies that the CAP program is either field or conflict preempted by the FPA and insists that it does not violate the Supremacy Clause of the Constitution.

Additionally, Franklin denies that the modification to the RPS within Section 2(a) interferes with interstate commerce. Section 2(a)'s modification to the RPS requiring electric generation facilities to use "certified biomass feedstock" with coal to decrease the state's

environmental impact does not fall within actions prevented by the dormant Commerce Clause. This limitation does not burden interstate commerce because it is not limiting the production of biomass only to Franklin. Instead, Section 2(a) only limits what fuel the electric distribution facilities procure based on the suitability of the feedstock to be co-fired with coal, which only incidentally affects interstate commerce.

The State also argues that the Section 2(b) does not violate the dormant Commerce Clause because the intention of the law is not to discriminate against out-of-state renewable resources. Instead, it is to promote customer-sited generation in the interest of improving resiliency of the electric utility grid and ultimately addressing the threat of volatility to the electricity market within the State. The carve-out for CHP facilities does not discriminate against interstate commerce because CHP usage is incidental in that it can only be implemented in a localized manner where the customers are located. Furthermore, Section 2(b) is not invalid under the dormant Commerce Clause because Franklin's legitimate state interest in advancing sustainable practices to comply with federal regulations and to help sustain the State's economy are not outweighed by the limiting impact the law has on interstate commerce.

ARGUMENT

The Twelfth Circuit will review all four issues de novo. The de novo standard applies when the issues are questions of law. Constitutional interpretation as well as motions for summary judgment are reviewed under this standard. *Pullman Standard v. Swint*, 456 U.S. 273 (1982).

I. SECTION 1 OF EDEA IS NOT "FIELD PREEMPTED" UNDER THE SUPREMACY CLAUSE BECAUSE IT DOES NOT REGULATE THE SALE OF ELECTRIC ENERGY AND THE SALE OF CAPACITY AT WHOLESALE IN INTERSTATE COMMERCE.

The District Court improperly determined that Section 1 of the EDEA is field preempted under the Supremacy Clause. While FERC has exclusive jurisdiction under the Federal Power Act

regarding the sale of electric energy and capacity at wholesale in interstate commerce, the State of Franklin's CAP program would not interfere with wholesale markets, so the EDEA is not in the same field that Congress intended FERC to regulate. Further, the FPA gives states exclusive jurisdiction over retail sales to end-use consumers, which is what the CAP program regulates.

The Supremacy Clause of the United States Constitution states "this Constitution, and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land." U.S. CONST. art. VI, § 2. Under the Supremacy Clause, if a state law conflicts with a federal law, the federal law trumps the state law, thereby "preempting" the state law. There are two types of preemption under the Supremacy Clause. The first kind, express preemption, arises when a federal law specifically says that it preempts state law.[1] The other kind of preemption is implied preemption, which occurs when a federal statute does not explicitly proscribe any concurrent state regulation, but the federal law is written in such a way that a state law cannot possibly regulate the same area without conflicting in some way with the federal statute. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Implied preemption is further broken down into two subcategories.[2] The first, field preemption, occurs "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

Congressional intent generally directs a court's analysis of preemption under the Supremacy Clause. If the federal law is broad and covers a large portion of the subject area, then a court is likely to find that the federal law preempts a conflicting state law. Examples of such

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[1] None of the issues presented in this appeal concern express preemption, so the relevant legal standards will not be discussed in this brief.
[2] The second category of implied preemption is conflict preemption, which will be discussed in detail in Argument II of this brief.

fields are foreign relations, bankruptcy, patent and trademark, admiralty, and immigration. However, if the field in question is one that is generally left to the states, such as statutes regulating health and safety, then a court is likely to find that the federal law does not preempt the state law.

For the reasons presented below, this Court should find that the CAP Program administered by the State of Franklin is not field preempted under the Supremacy Clause because it does not impact the wholesale power markets regulated by FERC under the FPA; therefore, the District Court's holding impermissibly expands FERC's jurisdiction under the FPA.

A. The CAP Program administered under Section 1 of the EDEA does not interfere with wholesale power markets, and therefore, is not in the same regulatory field as the FPA.

The District Court improperly found that Section 1 of the EDEA impacted the sale of electricity and capacity at the wholesale level, and was therefore field preempted by the FPA. Enacted in 1935, the FPA grants the federal government authority over "the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce." R.11. The Supreme Court has consistently held that FERC has pervasive authority specifically over transmission and wholesale markets for electricity and capacity. *See generally New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986).

However, the Act also constrained the reach of federal authority to "matters which are not subject to regulation by the States." R.11. Therefore, under the FPA, States may regulate retail sales to end-use customers, facilities used for generation, local distribution, and intrastate transmission. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988). So long as the state regulation is not seeking to regulate either transmission or wholesale markets for electricity and capacity, the state statute is not field preempted by the FPA.

Circuit courts have held that state legislation that serves to "set the rate" of electricity is field preempted by the FPA. *See PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *see also PPL Energy Plus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). A Maryland statute that required each state distribution utility to "enter into a contract for differences with a new natural-gas fired generator" was field preempted by the FPA because it "functionally sets the rate that the developer receives for its sales in the PJM auction markets," thereby "comprises the integrity of the federal scheme." *Id.* However, the Third Circuit clarified that it does not view [the statute's] "incidental effects on the interstate wholesale price of electric capacity as the basis of its preemption problem…were we to determine otherwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply. That is not the law." *PPL Energy Plus*, 766 F.3d. at 255.

Section 1 of the EDEA does not set the developer's rate for sales in the PJM markets. The Maryland statute from *Energy Plus* required the electric utility to set a price to recover the differences. The Franklin statute is different in that it does not mandate setting a price for the utility to use as rates. Instead, the EDEA indirectly decreases the price of the electricity that the generators sell. This indirect impact on the market cannot be read as a mandated price, and doing so expressly disregards the Third Circuit's warning in *EnergyPlus*. To find that an indirect impact on rates qualifies as a state "functionally setting a price" removes the state from electricity regulation entirely. Such a reading would grant FERC exclusive jurisdiction over all aspects of electricity regulation, which "is not the law" and goes beyond the scope of what Congress intended FERC to regulate under the FPA.

The District Court also wrongfully expanded FERC's jurisdiction under the FPA. The State of Franklin relies on both bilateral contracts between a buyer and seller and a regional wholesale

market to sell electricity and capacity to its consumers. R.11. In general, contract law is regulated at the state level, leaving little room for federal intervention; therefore, the sale of electricity and capacity in this manner cannot be found to be field preempted by federal law. As applied to Franklin, the FPA cannot be read to grant FERC the authority to regulate bilateral agreements in a state because FERC is only granted the authority to regulate wholesale markets of electricity and capacity. Since the bilateral agreements used in Franklin operate independently from this wholesale market, the FPA cannot be read to preempt these agreements, and the District Court's decision finding otherwise must be reversed.

The State of Franklin does use the wholesale market for some of its electricity and capacity sales, r.5, and FERC is conceded to have jurisdiction over the operation of that market. The PJM Interconnection, as a neutral, independent party overseen by FERC, sets the prices for the electricity and capacity sold in this wholesale market. However, the District Court's finding that FERC maintains jurisdiction over all of these aspects of Franklin's electricity market goes beyond the scope of FERC's power. Capacity may also be sold and acquired through bilateral agreements or buyers' procurement of demand-side resources, which do not rely on the wholesale market. Section 1 of EDEA regulates these other avenues of capacity and electricity sale, and since FERC does not have the same jurisdiction as the State of Franklin to do so, the FPA cannot possibly be found to field preempt Section 1 because both statutes regulate different, independent fields.

B. The CAP Program will decrease, not increase, the price of electricity from the generators.

The District Court improperly found that Franklin's CAP Program interferes with the wholesale market. Specifically, the court determined that CAPs interfere with the setting of capacity prices by the PJM because "the coal-fired plants receiving the CAPs would be receiving

substantial out-of-market payments that set a higher, above-market price for electricity sold by the subsidized generators." R.12.

Contrary to the District Court's opinion, the CAP Program would not set higher prices for electricity sold by the subsidized generators. Instead, the prices from the subsidized generators would decrease because of the ratemaking process utilized by electricity generators. To establish electricity rates, generators and distributors must partake in a rate case, which is heard in front of the respective state's electricity commissioners. The electricity companies present evidence providing their revenues and projected customer rates to recover a set revenue, opposing parties can submit contradictory evidence, and the commissioners determine the rate the electricity distributor may charge to recover a specified revenue.

If the utility receives a subsidy from the State, the amount of that subsidy cannot simply be added to the utility's revenue. Since the commission sets the profit that a utility may receive, the utility would have to alter its rate to match that prescribed profit. By receiving more money, the utility would have to actually charge lower rates to recover that same level of profit. This fundamental understanding of how the electricity utilities operate prohibits the results feared by the District Court, warranting a reversal of that decision by this Court.

If the District Court was correct in determining that the CAP Program would set higher prices for electricity sold by subsidized generators, then Franklin's Program would effectively drive their own generators out of business. In the wholesale market side of electricity and capacity sales, Franklin utilizes single-price clearing auctions to determine at what price the electricity is sold to customers. In such auctions, generators bid certain amounts of megawatt hours at a particular price per megawatt hour to PJM. The lowest bidders who are able to provide the required amount of electricity are selected, eliminating the higher-priced bidders from contention.

Therefore, generators who have to set higher prices are usually eliminated from these auctions because they are unable to compete with the lower-priced generators, and do not receive any contracts to sell electricity.

The State of Franklin enacted this legislation, in part, to preserve the electricity generators in Franklin and keep them competitive with other generators. By enacting legislation that effectively set higher electricity prices, Franklin would be removing its own generators from participating competitively in these auctions, which would yield the opposite effect of the intended regulation. In reviewing this statute, this Court cannot determine that Franklin would legislate its own generators out of competition in the wholesale electricity market. As explained above, the actual impact of the EDEA would be to decrease the price of electricity sold by subsidized generators.

II. SECTION 1 OF THE EDEA IS NOT CONFLICT PREEMPTED UNDER THE SUPREMACY CLAUSE BECAUSE COMPLIANCE WITH BOTH STATE AND FEDERAL LAWS IS NOT IMPOSSIBLE AND THE STATE LAW IS NOT INCONSISTENT WITH THE PURPOSES AND OBJECTIVES OF THE FPA.

The District Court improperly held that Section 1 of the EDEA is conflict preempted by the FPA because the CAP Program would interfere with the market signals from the single-auction process, thereby discouraging potential investors from financing and building new economic generation. R.13.

As described above, the Supremacy Clause establishes that a state law may not stand if it is preempted by federal law. Preemption may be either express or implied, and implied preemption may either be field preemption or conflict preemption. The second issue of this appeal concerns conflict preemption, which arises when either it is impossible to comply with both the federal and state regulations or when the state law is inconsistent with the purposes and objectives of federal

law. *See Gade*, 505 U.S. at 98 (citing *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963) and *Hines*, 312 U.S. at 67).

If it is impossible to comply with both the federal and state regulations, then the state regulation is in direct physical conflict with its federal counterpart. In such instances, the regulations are drafted in a way that makes it impossible for someone to obey the federal and state regulations concurrently. *See McDermott v. Wisconsin*, 228 U.S. 115 (1913).

If a state statute is inconsistent with the purposes of a federal statute, then a court will find that the state statute is conflict-preempted by the federal statute. In such cases, courts will look to legislative intent to determine the purposes of the federal legislation and determine whether the state statute conflicted with those purposes. For example, in *Pacific Gas & Electric Co. v. State Energy Comm'n*, California passed a law requiring any person constructing a nuclear power plant to ensure that "adequate storage facilities and means of disposal" existed for the nuclear waste. 461 U.S. 190 (1983). The State was sued because Congress' federal law on the subject was purposed to promote adaptation of nuclear power, and the state action allegedly interfered with that purpose. *Id.* The Supreme Court found for the State, holding that the State's pursuance of safety through requiring adequate storage and disposal facilities did not conflict with the purposes of the federal scheme. *Id.*

For the reasons presented below, this Court should find that Section 1 of the EDEA is not conflict preempted by the Supremacy Clause because compliance with the EDEA and FPA is not impossible, the EDEA is not inconsistent with the purposes and objectives of the FPA, and the EDEA would not interfere with market signals in the wholesale market because the rates that the utilities set would be the same with or without the EDEA.

A. Simultaneous compliance with the EDEA and the FPA is not impossible.

This Court should reverse the District Court's decision that Section 1 of the EDEA is conflict preempted by the FPA because compliance with both statutes at the same time is possible. The FPA, in relevant part, provides FERC with the authority to oversee the wholesale market for the sale of electricity and capacity. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Meanwhile, the CAP Program provides a subsidy to specific generators to ensure that they are able to produce energy in an efficient manner. R.3-4. The generators that receive this subsidy are still able to operate within the independently-overseen single-price auction, while generators that do not receive a subsidy are not impacted in the auction. Therefore, simultaneous compliance with both statutes is not impossible.

Not only is simultaneous compliance not impossible, but it is also preferable. Without the CAP Program under the EDEA, the current generators in Franklin would continue to face their capacity generation issues, creating uncertainty in the wholesale market. This uncertainty would lead to volatility in the market as different generators charged different prices for their electricity, which would negatively impact the consumers. However, with the CAP Program in place, the generators that are currently facing uncertainty in capacity generation would be able to resolve those issues by remaining consistently operational and providing nonvolatile service to customers in Franklin. Given this result from the CAP Program, the District Court's finding that Section 1 of the EDEA should be reversed by this Court.

B. The EDEA is not inconsistent with the purposes and objectives of the FPA, which are to provide low-cost and efficient power to consumers.

The purpose of the FPA is to provide efficient, low-cost power to U.S. electricity customers. R.13. FERC has determined that market-based processes approved and overseen by

FERC are the best way to achieve this purpose. *Id.* FERC oversees the single-price clearing auction, which is a method Franklin uses to sell electricity and capacity. R.11.

The purposes of the EDEA are to support economic growth, mitigate and solve issues related to local generation, address capacity deficiencies, serve the public interest, and incentivize the use of renewable energy sources. R.4. These interests are not contradictory to the purpose of the FPA because both statutes seek to support the public interest and make electricity supply more efficient and affordable for customers.

Contrary to the District Court's findings, the EDEA actually strengthens FPA's purpose by supporting efficient electricity production and keeping the price of energy low through the CAP Program. The State of Franklin determined that five coal-fired generating plants met the eligibility requirements of the EDEA, altogether generating 3,500 MW of capacity. R.7. Since Franklin has recently had problems with generation of capacity, R.4., subsidizing these particular generators will ensure that they remain in operation, thereby ensuring that the people of Franklin will no longer suffer from capacity shortages.

Additionally, the subsidy from the CAP Program actually decreases the rates for customers. As described above in Argument II, the State determines the revenue requirement for a utility, thereby dictating the rate a utility may charge customers to obtain that revenue. If the utility is receiving a subsidy from the state or is able to buy cheaper energy from the generator, as is the case in Franklin following enactment of the EDEA, then the utility is required to decrease its rate to maintain the specific revenue, which decreases the amount customers would have to pay for energy. Under the CAP Program, customers would be required to pay lower rates, which satisfies one of the purposes of the FPA. The District Court's finding that the CAP Program is conflict preempted aggravates this purpose, and therefore should be reversed by this Court.

III. SECTION 2(A) OF THE EDEA IS NOT INVALID UNDER THE DORMANT COMMERCE CLAUSE BECAUSE IT NEITHER IS FACIALLY DISCRIMINATORY NOR CREATES AN UNDUE BURDEN ON INTERSTATE COMMERCE.

The District Court's holding that Section 2(a) of the EDEA is invalid under the dormant Commerce Clause was improper and should be reversed. The dormant Commerce Clause is a legal inference drawn by courts in the analysis of Article I of the Constitution. The Commerce Clause gives Congress the authority to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. There is a lack of express authority given to states creating the inference that states cannot regulate interstate commerce, even if Congress has not attempted to regulate a specific aspect of it. This discussion began in *Gibbons v. Odgen,* in which Chief Justice Marshall argued that the Constitution vested the power over interstate commerce exclusively in Congress. 22 U.S. 1, 8 (1824). In *Cooley v. Bd. of Wardens,* the Court clarified that Congress' power over interstate commerce is not completely exclusive. 53 U.S. 299, 306 (1852). The Court stated, "even if it be a regulation of commerce, the power of Congress is not exclusive. No conflicting legislation by Congress exists, and the State law is therefore valid." *Id.* at 307. There are two scenarios in which state legislation is deemed invalid under the dormant Commerce Clause—when the law facially discriminates against out-of-state participants in the market, and when the effect of the legislation favors in-state economic interests over out-of-state interests.

A law is labeled as facially discriminatory if it expressly differentiates in-state and out-of-state interests within interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). If a facially discriminatory law is motivated strictly by an in-state economic interest, it is considered per se invalid. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). If a state statute is not facially discriminatory, but still has an impact on interstate commerce, it is evaluated using a balancing test developed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the

balancing test, if the state cannot prove that the statute was created to serve a legitimate safety risk and did not impose too high of a burden on interstate commerce, then the statute is invalid under the dormant Commerce Clause. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 675-76 (1981). The burden must be outweighed by the legitimate state interest to be valid.

The State of Franklin appeals to this Court to reverse the District Court's holding that Section 2(a) is not valid under the dormant Commerce Clause. Franklin argues that the geographic limitation of "certified biomass feedstock" imposed by the Section 2(a) neither is facially discriminatory nor creates an undue burden under the *Pike* test.

A. <u>Section 2(a) of the EDEA does not facially limit interstate commerce because nothing on the face of the document prohibits commerce with out-of-state market participants.</u>

The language of EDEA Section 2(a) does not expressly differentiate in-state interests and out-of-state interests. Therefore, the District Court improperly found the section invalid under the dormant Commerce Clause. A statute is invalid under the dormant Commerce Clause if it expressly discriminates against out-of-state participants in the market due to the motive of creating an unfair advantage for the State in the market. *Hughes*, 441 U.S. at 337. In this appeal, the District Court's holding was incorrect because the language "certified biomass" does not make the statute discriminatory toward interstate commerce. In *Hughes,* Oklahoma statutes, which prohibited the transportation of any commercially-significant number of natural minnows out of state for sale, were deemed invalid under the Dormant Commerce Clause. *Id.* at 338. The language used in the statutes was an overt act to block the flow of interstate commerce because there were other non-discriminatory, reasonable alternatives to protect the same interest. *Id.* at 337; See also *Dean Milk Co.*, 340 U.S. at 365 (law prohibiting the sale of imported pasteurized milk from another state without a permit was found invalid under the dormant Commerce Clause). If such a facially discriminatory law is motivated strictly by an in-state economic interest while there are other, less

discriminatory alternatives available, the statute is per se invalid under the Dormant Commerce Clause. *Id.* at 354.

Section 2(a) of the EDEA does not discriminate against interstate commerce because it modifies Franklin's RPS to enhance the environmental interest of the state. The language "certified biomass feedstock" is defined within Section 2(a)(3) of the statute as biomass feedstock that is harvested from forests that are identified by Franklin's DNR and Division of Commerce as a "Designated Biomass Growing Region." R.8. This language is not an overt act to exclude other states, but rather is a manner to increase the use of renewable resources to improve the environmental quality of the state while stabilizing the extremely volatile economy. Unlike both *Hughes* and *Dean Milk*, the statute does not specifically detriment out-of-state participants in the market on its face.

B. Section 2(a) of the EDEA is not, in effect, unduly burdensome on interstate commerce because there is a minimal, incidental burden placed on interstate commerce that is justified by a public interest and cannot be achieved by a different, less burdensome alternative.

The District Court's ruling was improper because while EDEA Section 2(a) affects interstate commerce, it does so minimally in comparison to the substantial benefit it creates in serving the public interest. If a statute is facially neutral, then the statute is tested to see if it is unduly burdensome on interstate commerce. *Pike,* 397 U.S. at 146. "Where the statute regulates evenhandedly 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… and on [if] it could be promoted as well with a lesser impact on interstate activities." *Id*. The state must show that where a statute affects interstate commerce, it is not invalid under the dormant Commerce Clause because the statute is

not unduly burdensome on interstate commerce and the public interest protected by the statute outweighs such burden.

While Section 2(a) affects interstate commerce, the state interest of improving the environmental impact while stabilizing the economy substantially outweighs any burden. The RPS was created to incorporate diversity within the generating sources used for electricity. By having more renewable sources included within the RPS, there is less of a negative environmental impact than the use of finite sources. Section 2(a) focused on this goal of having a lesser environmental impact to preserve public health, safety, and welfare by requiring electric distribution utilities to procure a specific amount of their fuel sources from plants co-fired with certified biomass. This also preserves economic viability within the state by creating a biomass industry.

The modification to the RPS affects interstate commerce through the Biomass Eligibility Determination Order issued by Franklin's DNR and Division of Commerce. The order identifies two forests, located solely within Franklin, from where "certified biomass" sufficient to satisfy Section 1 of EDEA can be taken. Appellee alleges Section 2(a) imposes an undue burden on interstate commerce and is thus invalid under the dormant Commerce Clause due to this geographic limitation. However, the District Court's holding should be reversed, as such burdens placed on interstate commerce from Section 2(a) do not outweigh the legitimate state interest of protecting public welfare by decreasing the environmental impact in Franklin and preserving the economy, as determined under the *Pike* balancing test.

The effect on interstate commerce by Section 2(a) is minimal. It was merely incidental to the legitimate state interest in requiring a specific type of biomass to be co-fired with coal to lessen the environmental impact while revitalizing the economy. In *Kassel*, the Court held that the statute limiting the length of trucks driven on state highways was not created for a legitimate state safety

interest, and the local regulation created a disproportionate negative impact on out-of-state residents and businesses. 450 U.S. at 676. While Section 2(a) limits the biomass used for co-firing to "certified biomass" within two forests solely located within Franklin, unlike the statute in *Kassel,* the statute's burden on out-of-state market participants is justified because there is a legitimate public interest to have specific biomass co-fired with coal in Franklin.

Franklin had a legitimate state interest in preserving the public welfare by decreasing the environmental impact in the state and aiding the economy. In *Family Winemakers of Cal. v. Jenkins*, the Court of Appeals for the First Circuit considered a Massachusetts statute that put a gallonage cap on wine distributors to specify permits that the distributors would be allowed to receive. 592 F.3d 1, 4 (1st Cir. 2010). The gallonage cap was not facially discriminatory, but it only benefitted Massachusetts small wineries. *Id.* Because of this, the court held that the statute was discriminatory in effect on out-of-state market participants and bore little relation to the market challenges alleged by the state to be the purpose of the statute. *Id.* Unlike *Family Winemakers*, the EDEA is significantly related to the interest to be achieved. The opportunity would allow the state to both improve the RPS in compliance with the more stringent federal environmental restriction by creating less of a negative environmental impact and revitalize the state's economy. If the economy does not improve, there is a major threat to the welfare of citizens both in-state and out-of-state. Thus, the public interest outweighs the merely incidental, minimal burden on interstate commerce under the *Pike* test, and the statute is valid under the dormant Commerce Clause, as there is no alternative that would do the same.

Ultimately, the District Court's decision on this issue should be reversed as Section 2(a) of the EDEA is not facially discriminatory or unduly burdensome. There is nothing on the face of the document that discriminated against out-of-state market participants. Additionally, the statute only

incidentally affects interstate commerce and is outweighed by the legitimate state interests in lessening the environmental impacts of electricity distribution and revitalizing the coal industry within the state. The statute addresses these issues in the least discriminatory way, leaving no room for a less-discriminatory alternative. Thus, this Court should reverse the District Court's decision and hold Section 2(a) as valid under the dormant Commerce Clause.

IV. THE COMBINED HEAT AND POWER CARVE-OUT OF SECTION 2(B) DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE THE BENEFITS OF ENERGY INDEPENDENCE, GREENHOUSE GAS EMISSIONS REDUCTION, AND IMPROVEMENTS TO THE LOCAL ECONOMY ARE LEGITIMATE INTERESTS OF THE STATE OF FRANKLIN WHICH OUTWEIGH THE MINIMAL BURDEN ON INTERSTATE COMMERCE.

The District Court found that Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because the "eligible facilities" for customer-sited generation connected to the grid of electric distribution utilities serving retail customers are only within Franklin, thus excluding participation from energy providers outside the state. As outlined in the previous section, a statute is invalid under the dormant Commerce Clause if it discriminates against interstate commerce or if the burden on interstate commerce outweighs a legitimate state interest. *Hughes*, 441 U.S. 322. If a statute does not discriminate, it must undergo *Pike* analysis to determine if the statute relates to the state's interest.

Franklin enacted its RPS in 2007, which included goals for renewable source standards. R.8. Section 2(b) of the EDEA modifies the RPS to include a "carve-out" for customer-sited CHP facilities. R.10. The goal of the "carve-out" is to ensure that a certain portion of the renewable energy is acquired from customer-sited, biomass-fueled CHP facilities. All CHP facilities are located on the customer side of the meter and must be connected to the distribution grid of an electric distribution company serving customers within Franklin. However, the procurement obligation for these co-generation facilities set by the EDEA is only an insignificant portion of all

of Franklin's energy sources. Section 2(b) sets the procurement obligation at one-half percent by 2020 and increases to one percent by 2030. R.10. Appellees claim, and the District Court agreed, that this carve-out is invalid under the dormant Commerce Clause because it excludes any state other than Franklin from participating, therefore burdening interstate commerce. However, the CHP carve-out is not discriminatory because it does not favor Franklin energy producers and Franklin's state interest reasonably outweighs any potential burden to interstate commerce.

A. The environmental benefits of utilizing CHP facilities.

Combined heat and power is an underutilized technology that generates electricity and captures the heat produced to use it on-site for another purpose such as space heating. Traditional energy generation systems waste the thermal energy generated, but with the localized cogeneration system, CHP can reach nearly eighty percent efficiency in comparison to fifty percent for conventional technologies. ENVTL. PROT. AGENCY, *Combined Heat and Power (CHP) Partnership, What is CHP?* (2016), https://www.epa.gov/chp/what-chp. Furthermore, CHP burns less fuel, which reduces greenhouse gas emissions and air pollution. Steven Ferraina, *Combined Heat and Power: A Technology Whose Time Has Come,* 32 UCLA J. ENVTL. L. & POL'Y 160, 162 (2014). The benefits of utilizing CHP on the customer side of the meter go beyond offsetting the emissions released from coal facilities by generating jobs and bolstering Franklin's energy grid.

B. Section 2(b) does not discriminate against interstate commerce in violation of the dormant Commerce Clause because the effects are merely incidental.

The first step in determining whether a statute is invalid under the Dormant Commerce Clause is to find if it discriminates against interstate commerce. If a statute is overtly discriminatory, it will survive only if there are "no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). A statute is discriminatory when it plainly "accord[s] differential treatment of in-state and out-of-state

economic interests that benefits the former and burdens the latter." *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 942 (8th Cir. 2009). Non-discriminatory statutes, on the other hand, are upheld unless the burden on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike*, 397 U.S. 137 at 142.

i. Section 2(b) does not facially discriminate or discriminate-in-effect against interstate commerce because it does not limit where the biomass used in the CHP facilities is derived.

A statute is discriminatory on its face only if it expressly differentiates between in-state and out-of-state economic interests in a manner that favors in-state interests. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994) (finding the statute discriminated on its face because it imposed higher disposal fees on solid waste originating out-of-state). Section 2(b) does not discriminate against out-of-state actors in a manner that favors Franklin's interests because the very nature of a CHP facility requires the source to be located on the customer side of the meter. It is not the intention of the carve-out to favor Franklin customers. Instead, it allows Franklin to diversify its electricity generation by using biomass. Additionally, Section 2(b) does not require the material used to be "certified biomass feedstock," so other states can sell their timber to Franklin customers operating CHP facilities. Consequently, Section 2(b) does not exclude out-of-state interests on its face.

If a statute significantly favors local economic actors at the detriment of out-of-state interests, it is discriminatory-in-effect. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 350-52 (1977). However, a large impact on out-of-state interests will not be considered discriminatory-in-effect unless the discriminatory effect is so substantial as to justify an inference of discriminatory intent. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (finding a statute imposing severance tax on coal that fell primary on out-of-state entities was non-

discriminatory because the tax applied evenly to all coal regardless of its final destination). Section 2(b) does not discriminate-in-effect because it does not require the biomass used in the facilities to be certified feedstock. Therefore, the section treats biomass from Franklin the same as biomass from another state.

C. Franklin's legitimate purposes for promulgating Section 2(b) are to comply with stricter federal standards that emphasize greater energy independence and to ensure that, as the coal powered economy is pushed out, Franklin's economy and people will remain afloat.

The State of Franklin's coal industry has supported the State's economy until recently, when the EPA promulgated more stringent environmental regulations. R.3. These regulations seek to decrease dependence on fossil fuels at the cost of Franklin's economy, job market, and energy supply. The purpose of the Section 2(b)'s CHP carve-out is to bolster the energy grid to make it more resilient for changes to come. Because the co-generation facilities are operated by Franklin energy customers, this carve-out will support local producers, in turn helping the economy.

In 1978, Congress amended the Federal Power Act by enacting the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 823a *et seq.* The energy crisis in the 1970s resulted in a shift away from foreign oil towards energy independence. *Freehold Cogeneration Assoc. v. Bd. of Reg. Comm'rs of N.J.*, 44 F.3d 1178, 1182 (3d Cir. 1995). Cogeneration facility construction was encouraged as a reliable method to meet this goal. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 132 (3d Cir. 1998). Through PURPA, FERC established rules that incentivized electric utilities to purchase energy from cogeneration facilities. 16 U.S.C. § 824a-3(a). It is in Franklin's interest to comply with PURPA in the creation of more CHP facilities.

D. Section 2(b)'s carve-out for cogeneration facilities in Franklin relates to the reasonable purpose of environmental sustainability and strengthening the electric grid for the safety of the people of Franklin.

When a state's purpose for a regulation relates to public health, safety, or environmental concerns, these factors weigh strongly in favor of upholding a statute under *Pike* analysis, even more so if the statute relates to an area traditionally regulated by states. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007). The regulation of utilities is among "the most important functions traditionally associated with the police power of the States." *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The State's ability to regulate utilities is necessary to ensure the reliability and affordability of electricity. *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 333 (1951). Courts will strongly weigh the local benefits conferred by statutes regulating utility resource planning because of the benefits to public interest. *See Southern Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002) ("[L]ocal public utility regulation is presumptively valid").

The purpose of Section 2(b) is to ensure Franklin is addressing the impact of strict EPA regulations on the coal industry. By setting goals for developing more CHP facilities that utilize biomass, Franklin is furthering the goal of the federal government. The law directly relates and supports the goals of Franklin to strengthen the electric grid which will create a safer environment for residents.

E. Franklin's reasoning for passing EDEA Section 2(b) outweighs the burden on interstate commerce because the burden is merely incidental and does not have a great impact on out-of-state electricity producers.

Statutes generally survive *Pike* balancing unless the statute "imposes[s] a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat. Elec. Mfrs Ass'n v. Sorrell*, 272 F.3d 104, 109 (2nd Cir. 2001). A plaintiff must make a substantial showing under *Pike* that the burden on interstate commerce is clearly excessive

in relation to putative local benefits. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008). "If a legitimate local purpose is found, then 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…" *Pike*, 397 U.S. at 142. Here, the issue is "one of degree" because the CHP carve out will have a minimal effect on the electric producers in both Franklin and surrounding states because the statute only requires cogeneration to make up one percent of all of Franklin's energy production by 2030. That number is insignificant when considering that eighty-two percent of Franklin's energy is generated by coal. R.3. The record does not indicate how much of Franklin's energy comes from out-of-state energy producers. Although Franklin is located in three LMP zones, it is unclear if the Vandalia South or Allegheny North zones would be significantly burdened if one percent of the energy used in Franklin is not produced by them.

Section 2(b) is a valid, non-discriminatory exercise of Franklin's long-standing authority to regulate utilities and energy sources used to serve Franklin customers. The statute does not violate the dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, the decision of the District Court for the Eastern District of Franklin granting EPC's motion for summary judgment should be reversed because Section 1 is neither "field preempted" nor "conflict preempted" under the Supremacy Clause, and Section 2(a) and 2(b) are both valid under the dormant Commerce Clause.

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 18