IN THE
UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT

State of Franklin,
Appellant,

v.   Case No. 16-02345

Electricity Producers Coalition,
Appellee.

APPELLANT'S BRIEF

Team 13,
Counsel for the State of Franklin

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The District Court accepted jurisdiction under 28 U.S.C. § 1331 as a case arising under the Constitution. R at 12. The court's judgment was filed on November 7, 2016. R. at 12. The state of Franklin's notice of appeal was filed on December 6, 2016. R. at 13. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that Section 1 of the Electric Diversification and Expansion Act ("EDEA") is preempted because it intrudes upon the "field" over which the Federal Energy Regulatory Commission ("FERC") is granted authority under the Federal Power Act ("FPA").
2. Whether the District Court erred in finding that Section 1 of the EDEA is preempted because it conflicts with FERC's chosen means of achieving "just and reasonable" prices.
3. Whether the District Court erred in finding Section 2(a) of the EDEA invalid under the dormant Commerce Clause because of the alleged geographic limitations of "certified biomass feedstock."
4. Whether the District Court erred in finding Section 2(b) invalid under the dormant Commerce Clause because of the geographic limitations of "eligible facilities."

STATEMENT OF THE CASE

In January 2016, Franklin enacted the Energy Diversification and Expansion Act ("EDEA"). R. at 3. Section 1 of the EDEA implements a Carbon Assistance Payment ("CAP") Program that provides economic relief to existing coal generation facilities via a subsidy program. R. at 3. Section 2 modifies the state's existing Renewable Portfolio Standard ("RPS") by mandating that distribution, retail utilities obtain a certain percentage of their electricity supply from generation facilities that use a certain combination of coal and biomass. R. at 6.

The Electricity Producers Coalition ("Coalition"), a national trade association with interests distinct and separate from the distribution utilities of Franklin, challenged the EDEA on July 1, 2016 in the Federal District Court for the Eastern District of Franklin. R. at 12. The Coalition sought declaratory and injunctive relief, alleging that: (i) the CAP Program was preempted by the Federal Power Act ("FPA") under the Supremacy Clause of the U.S. Constitution; and (ii) the RPS modification violated the Commerce Clause of the U.S. Constitution. R. at 12.

The District Court issued a decision favorable to the Coalition on November 7, 2016. R. at 12. The court granted the Coalition's motion for summary judgment, finding Section 1 of the EDEA to be preempted by the FPA under the doctrines of field and conflict preemption. R. at 12-13. The District Court further held that Sections 2(a), (b) of the EDEA violated the dormant Commerce Clause. R. at 13. The State of Franklin filed this appeal December 6, 2016 in the United States Court of Appeals for the Twelfth Circuit. R. at 13.

STATEMENT OF FACTS

In 1996, "the state of Franklin restructured its electricity markets to introduce competition at the retail level." R. at 5. Prior to restructuring, the electricity markets were entirely vertically integrated, with the state exercising authority over the retail markets. R. at 5. Twenty years later, in order to "preserv[e] the economic viability of the existing coal-fired generating plants and stimulat[e] the development of a biomass industry," Franklin passed the Energy Diversification and Expansion Act ("EDEA"). R. at 3. Due to a loss "of significant electrical generation capacity" from the retirement of numerous coal-fired generating plants, the mid-Atlantic region has been burdened, and "the availability of a reliable electricity supply within Franklin to support economic growth and expanded employment opportunities for its citizens is threatened." R. at 4. It is anticipated that there will be more retirements in the future. R. at 4. Franklin had no choice but to address this, as PJM,[1] the entity designated with managing the regional electric power grid, is not authorized "to order new generation as a means of mitigating local electrical system reliability concerns and solve other issues related to the lack of local generation." R. at 4.

As a result, Franklin is faced with possible capacity deficiencies. R. at 4. Therefore, in the interest of the public, Franklin chose to provide a means of "financial support for existing coal-fired generating facilities . . . [to] assist Franklin's economic development by ensuring a reliable and reasonably priced electricity supply" through the EDEA. R. at 4. Not only will the EDEA "[f]oster[] and incentiviz[e] the development of a limited program for new electric generating facilities," but it will additionally allow for: (i) sufficient capacity; (ii) stabilized power prices; and (iii) energy industry employment prospects in Franklin. R. at 4. Furthermore, the development of

[1] PJM is the Independent System Operator ("ISO") "serving all or parts of 13 mid-Atlantic and Midwestern states and the District of Columbia." R. at 5. It is an "independent, non-profit entit[y] regulated by the Federal Energy Regulatory Commission." R. at 5.

distributed energy resources ("DERs") will "increase the resilience of the electric utility grid, reduce transmission and distribution costs, and provide additional tools for customers to manage their energy costs." R. at 5.

Section 1 instituted a direct subsidy program, called the Carbon Assistance Payment ("CAP") Program, for existing coal-fired generators. *See* R. at 3. To be eligible for the CAP Program, Section 1 requires coal-fired generators to offer capacity bids into the PJM Interconnection. R. at 7. However, the law does not require that generators clear the auction to be eligible. *See* R. at 7.

Section 1(a)(6) of the EDEA defines an "eligible coal-fired generating plant" as follows:

> [A]ny electric generating plant (i) located within the Franklin East, Vandalia South, or Allegheny North zones within the PJM operating region, (ii) which relies on coal as its primary fuel source, at least ten percent (10%) of which originates from coal mines located in whole or in part within the state of Franklin, and (iii) which has been determined by the Commission to require financial assistance to sustain its continued operations, based on the Commission's analysis and findings with respect to such plant's projected energy, capacity and ancillary service revenues and projected fuel and operating and maintenance (O&M) costs.

R. at 6. The CAP Program will allow for the "continued operations" of coal-fired generating plants, and the amount received is not determinative solely based on the value of wholesale capacity prices. *See* R. at 6. Rather, under Section 1(a)(2), the amount paid under the CAP Program is determined by the Commission, considering:

> (i) the incremental capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity, (ii) the extent to which energy, capacity and ancillary services revenues of eligible coal fired generating plants are insufficient to allow such plants to continue operating, (iii) the impacts of such Payments on ratepayers within Franklin, and (iv) the public interest.

R. at 6-7. The number of CAPs distributed to each generator annually is capped at a megawatt hour (MWh) amount, "that represents the verifiable historic contribution such units have made to the electricity generating mix consumed by retail electricity customers within Franklin." R. at 7.

Section 2(a) modifies Franklin's pre-existing Renewable Portfolio Standard ("RPS") to require the distribution utilities "to procure a specified percentage [3 percent by 2020, and 5 percent by 2030] of their electricity supply for retail customers within Franklin from electric generating plants fired with a fuel supply comprising coal and no less than 15 percent certified biomass feedstock." R at 8. The state of Franklin has designed its RPS to impose mandates upon five distribution utilities within the state.[2] R. at 8. Section 2(a), through its expansion of the RPS provides the distribution utilities with access to coal plants that utilize out of state biomass producers, creating a regulatory framework that balances all of these pertinent, local interests. *See* R. at 8-9.

Furthermore, Section 2(a)(3) provides: "'Certified biomass feedstock' means biomass feedstock that is harvested from a forest identified by the Franklin Department of Natural Resources and the Franklin Division of Commerce as a 'Designated Biomass Growing Region' pursuant to Section 2(a)(4) of this Act." R. at 8. Under Section 2(a)(4), "Designated Biomass Growing Region" is defined as:

> [A]n area within the state of Franklin and the adjoining states thereto that has been identified by (i) the Franklin Department of Natural Resources (DNR) as containing biomass suitable for sustainable harvest and use as a feedstock for co-firing with coal to generate electricity. . . and (ii) the Franklin Division of Commerce ["FDC"] as an economically depressed area[.]

R. at 9. In the joint "Biomass Eligibility Determination Order," the DNR and FDC identified two growing regions that met this standard: (i) the Franklin-Alleghany Forest, which falls within the boundaries of *both* Franklin and the neighboring state of Vandalia; and (ii) the Central Appalachian

[2] It is important to note that the distribution utilities are distinct from the Electricity Producers Coalition, as the Coalition is a national trade association that represents a number of competitive electric power suppliers on the wholesale and retail markets with financial investment within Franklin and the PJM region. *See* R. at 12.

Forest, which is "entirely within Franklin." R. at 9. The Franklin legislature found that "[i]ntegrating biomass energy into the fuel supply for coal-fired power plants will provide substantial environmental benefits . . . [and] will result in reduced greenhouse gas emissions from electric generating resources." R. at 4. Additionally, it found that "[c]o-firing biomass with coal will . . . diversify the electric generating portfolio and reduce the volatility of power prices." R. at 4. Further, Franklin cites various other local benefits including: (i) the continued integrity of the coal industry; (ii) electricity reliability and security; and (iii) economic development. *See* R. at 3-5.

Additionally, the EDEA includes a carve-out in Section 2(b) "for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass." R. at 4. In Section 2(b), the distribution utilities are required to purchase a designated amount of capacity [0.5 percent by 2020, and 1 percent by 2030] from customer-sited combined heat and power or cogeneration facilities that utilize biomass. *See* R. at 4. Under Section 2(b), a customer-sited cogeneration facility need not comply with the biomass standards associated with 2(a). R. at 10. Distributed energy resources, such as those contemplated within 2(b), "increase the resilience of the electric utility grid, reduce transmission and distribution costs, and provide tools for customers to manage their energy costs." R. at 5.

SUMMARY OF THE ARGUMENT

The District Court erred in finding Section 1 of the EDEA to be preempted by the Federal Power Act ("FPA"). The FPA describes an "interdependent" and "collaborative" system of jurisdiction. *Hughes v. Talen Energy Mktg., LLC,* 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring). In short, the FPA is meant to encourage a state-federal relationship. States may not set, or "directly affect" wholesale rates, but they may exercise control over the realms of power reserved for them under the FPA. By creating a direct subsidy program targeted at a narrowly defined group of generators, Franklin neither "set" a wholesale rate, nor "directly affected" the wholesale rate, and therefore the law may not be field preempted. Furthermore, no federal law directly conflicts with the CAP program, and therefore the CAP Program is not conflict preempted. Specifically, the Minimum Offer Price Rule ("MOPR") does not apply to the existing generators at hand, and therefore the CAP Program does not act as an "obstacle" to the federal scheme chosen by FERC to protect against market power manipulation. *See Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000).

Additionally, the District Court erred in invalidating Sections 2(a) and 2(b) of the EDEA under the dormant Commerce Clause. First, Sections 2(a), (b) regulate the distribution utilities and not the Coalition, nor its members. Accordingly, the Coalition lacks standing to bring a claim against Sections 2(a), (b). Second, Section 2(a) does not violate the dormant Commerce Clause, as it is a non-discriminatory law that offers ample local benefits with minimal, if any, incidental impacts on interstate commerce. Third, Section 2(b) does not violate the dormant Commerce Clause, as it is supported by a valid local purpose, and there is no reasonable alternative by which Franklin could modify its RPS to both ensure that biomass feedstock was incorporated into the state's power supply, and support customer-sited cogeneration.

ARGUMENT

The District Court erred in finding Section 1 of the Energy Diversification and Expansion Act ("EDEA") preempted by the Supremacy Clause. State laws may only be preempted in two instances: (i) where "Congress has legislated comprehensively to occupy an entire field of regulation" *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.,* 489 U.S. 493, 509 (1989); and (ii) where a challenged law stands as "an obstacle" to Federal law. *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000). Neither instance is applicable here.

The District Court also erred in invalidating Sections 2(a) and 2(b) of the EDEA pursuant to the dormant Commerce Clause. The District Court should not have reached the merits of the dormant Commerce Clause issue, as the Coalition lacks standing to bring a claim against Section 2. Standing aside, Sections 2(a), (b) are constitutional.

Appellate courts apply *de novo* review to a district court's grant or denial of summary judgment, as is the case here. *See, e.g., Rodriguez v. Am. Intern. Ins. Co. of Puerto Rico*, 402 F.3d 45, 46 (1st Cir. 2005).

I. EDEA SECTION 1 IS CONSTITUTIONALLY VALID UNDER THE SUPREMACY CLAUSE.

Under the Supremacy Clause, the Constitution and the laws of the United States "shall be the supreme Law of the Land; . . . [and] any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A state law is preempted in a case where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 509 (1989). A state law is also preempted "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade*

Council, 530 U.S. 363, 373 (2000) (brackets and internal quotation marks omitted).

The Federal Power Act ("FPA"), in turn, "embodies Congress's attempt 'to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry.'" *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014) (citing *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 531 (1945)). In a recent concurring opinion, Justice Sotomayor wrote, "[T]he Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence." *Hughes v. Talen Energy Mktg., LLC,* 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring). Importantly, the opinion cautioned that "courts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation' for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (quoting *Nw. Cent. Pipeline Corp.,* 489 U.S. 493, at 518) (Sotomayor, J., concurring).

Here, the FPA does not field preempt Section 1 of the EDEA because the Carbon Assistance Payment ("CAP") Program is a retail activity that falls within the powers the FPA reserved for states, and does not alter "the amount . . . hand[ed] over in exchange for power," *FERC v. Electric Power Supply Assn.,* 136 S. Ct. 760, 777 (2016) (*EPSA*), nor does it "directly affect[]" wholesale rates. *Schneidewind v. ANR Pipeline Co.,* 485 U. S. 293, 309 (1988). Similarly, the CAP Program is not conflict preempted because it is not impossible to comply with "both state and federal law," it does not preclude fulfillment of FERC's goals, and it achieves a "proper state purpose." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 516.

A. <u>The Section 1 CAP Program Does Not Set, or "Directly Affect," Wholesale Rates.</u>

Section 824(b) of the FPA grants FERC jurisdiction over both "the sale of electric energy at wholesale in interstate commerce," and "the transmission of electric energy in interstate

commerce." 16 U.S.C. § 824(b)(1). This power is exclusive. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 374 (1988) ("States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates[.]") However, "the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity." *EPSA,* 136 S. Ct. at 766 (quoting § 824(b)). States also reserve authority over in-state facilities used for the "generation of electricity." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983). States may regulate within their reserved powers even when their laws "incidentally affect[]" areas regulated by FERC. *Accord. PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d. 467, 479 (4th Cir. 2014). Indeed, whether a state law is preempted often depends on the "*target* at which the state law *aims*." *See Oneok, Inc. v. Learjet, Inc.,* 135 S. Ct. 1591, 1599 (2015). States may not, however, "seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates" by directly targeting interstate purchasers and wholesalers for resale. *Hughes,* 136 S. Ct. at 1291. Specifically, states must not disregard "interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates." *Id.* at 1299.

Franklin determined that both recent and anticipated coal plant retirements may cause generation and capacity shortages in the absence of state action. R. at 4. Because the PJM lacks the authority to order new generation, Franklin had to act to either (i) order the construction of new generation; or (ii) design a subsidy directly targeting existing generation to retain the economic viability of the generators. *See* R. at 4. The state of Franklin chose the latter. The CAP Program is designed to sustain the economic viability of certain electricity generators in Franklin and to benefit the retail consumers of the state of Franklin, two powers reserved to the states by the FPA.

See R. at 3-4. Section 1 was not "aimed at" affecting the wholesale rates over which FERC exercises jurisdiction, nor does it actually "directly affect[]" the wholesale rates. *See* Oneok, 135 S. Ct., at 1599. In sum, not only is Section 1 in line with Franklin's traditional role as a regulator of vertically integrated utilities, but it also falls squarely within the powers reserved for the states.

1. The CAP Program is "untethered" from wholesale market participation.

To set a rate is "to establish the amount of money . . . hand[ed] over in exchange for power. Nothing in [the Federal Power Act] . . . suggests a more expansive notion." *EPSA*, 136 S. Ct. at 777. Thus, any state law which is "untethered," *Hughes*, 136 S. Ct. at 1299 (internal quotations omitted), or separate from a generator's wholesale market participation does not "set" a wholesale rate. *See Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at P 31 & n.62 (2010).

FERC itself has described a category of state-created incentives that are not field preempted—Renewable Energy Credits ("RECs"). *See WSPP*, 139 FERC ¶ 61,061, at P 21 (2012). In *WSPP*, FERC stated that RECs are state "instruments certifying that electric energy was generated pursuant to certain . . . standards." *Id.* According to FERC, RECs are "separate commodities from . . . capacity and energy." *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at n.62 (2010). Because FERC decided that a REC is sold "independent of . . . wholesale electric energy," RECs fall within state jurisdiction. *WSPP*, 139 FERC ¶ 61,061 at P 24.

In *Nazarian*, the case reviewed by the Supreme Court in *Hughes*, the state of Maryland responded to concerns over a lack of adequate generation resources by instituting a program which required Maryland utilities to enter into long-term contracts to begin construction of new electric generation facilities. *PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467, 473 (4th Cir. 2014), *aff'd sub nom., Hughes v. Talen Energy LLC,* 136 S. Ct. 1288 (2016). Accordingly, Maryland designed its Contract for Differences ("CfD") Program to "ensure[]. . . a fixed price for every unit of energy

and capacity it [sold] in the PJM auction, regardless of the market price." *Nazarian,* 753 F.3d at 477. The structure of payment was as follows: "[i]f [the selected generator's] capacity clears the PJM capacity auction and the clearing price falls below the price guaranteed in the contract for differences, Maryland LSEs pay [the selected generator] the difference between the contract price and the clearing price." *Hughes*, 136 S. Ct. at 1295. The Supreme Court affirmed the Fourth Circuit, finding Maryland's actions to be field preempted because it "operate[d] within the auction, mandating LSEs and CPV to exchange money based on the cost of CPV's capacity sales to PJM." *Id.* at 1291. Therefore, the Court found it "set[] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 1297.

Importantly, even though the Supreme Court preempted the Maryland program in *Hughes*, the Court reserved judgment on other state efforts to address issues of capacity and power deficiencies, and specifically declined to extend its holding to preempt state measures that are "untethered to a generator's wholesale market participation." *See Hughes*, 136 S. Ct. at 1299 ("We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including . . . direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector.")

Here, the CAP Program is more akin to a REC than the CfD in *Hughes*. The CAP program is a direct subsidy targeting retail sales. *See* R. at 3. First, while the CAP Program involves a long-term contract, it does not create a "fixed price" by providing the difference between the clearing price and contract price. R. at 6. The payments generators will receive are capped annually based upon each unit's historical contributions consumed by *retail* customers. *See* R. at 7. Second, the amount each generator receives is not directly tied, or "tethered" to the wholesale clearing price, as was the long-term contract in *Hughes*. *Hughes,* 136 S. Ct. at 1299; R. at 7-8.

Although Section 1 requires generators to bid into the PJM auction, it "does not condition payment of funds on capacity clearing the auction," and therefore does not "suffer from the fatal defect that render[ed] Maryland's program unacceptable." *Hughes*, 136 S. Ct. at 1299; R. at 7. Further, PJM approval of a "Fixed Resource Requirement Plan" will meet the "offer" requirement, which would effectively sever any alleged "tethers" Section 1 may have on the clearing price. *See* Fixed Resource Requirement Alternative, PJM Reliability Assurance Agreement ("RAA"), at Schedule 8.1. Finally, the CAP price does not determine the price the generator will ultimately pay at wholesale. *See Hughes*, 136 S. Ct. at 1295; *see* R. at 4. Thus, the CAP Program, like RECs, is "separate" and "untethered" from wholesale prices.

2. The CAP Program's effects are no more than incidental to wholesale rates.

Not "every state statute that has some indirect effect" on wholesale rates is preempted. *Schneidewind*, 485 U.S. at 308. Additionally, "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market." *Nw. Cent. Pipeline Corp.,* 489 U.S. at 514. FERC has held that "when an unbundled REC transaction is independent of a wholesale electric energy transaction," it "does not affect wholesale electricity rates." *WSPP*, 139 FERC ¶ 61,061, P 24. Further, FERC has held that states may "encourage renewable or other types of resources . . . by giving direct subsidies." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995).

Specifically, states may "require retirement of existing generators [or construction of] expensive, environmentally-friendly units, or . . . take any other action in their role as regulators of generation," even while "those choices affect the pool of bidders" in wholesale markets "which in turn affects the market clearing price." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

In *Connecticut Department of Utility Control v. FERC*, at issue was FERC's ability to set an "Installed Capacity Requirement," a rule that the Connecticut Department of Utility Control argued "directly affected" states' decisions to order new generation. *See* 569 F.3d at 481. The court sided with FERC, holding that because FERC's rule "necessarily affect[ed] prices but not necessarily new capacity construction," there was "no direct regulation of generation facilities in violation of section 201." *Id.* at 482 ("The 'Installed Capacity Requirement' is misnamed because increasing it doesn't actually 'require' anyone to 'install' any new 'capacity' at all.") Thus, to argue that states are unable to institute a direct subsidy that may indirectly or tangentially affect wholesale prices is to deny states the powers reserved for them under the FPA. *See* 16 U.S.C. § 824(b)(1).

The holding in *Oneok*[3] supports this conclusion. In *Oneok*, a state antitrust law would result in lawsuits that would have directly regulated how gas sellers priced their wholesale sales, as subject to the Natural Gas Act. *See* 135 S. Ct at 1599. However, the law was not preempted. Because the law was aimed at preventing distortion of the *retail* market, the lawsuits were not "target[ed]" at FERC's domain. *Id.* (emphasis omitted). *Schneidewind*, cited by the court in *Oneok*, is also consistent with this idea. *See* 485 U.S., at 306-309 (finding a state law preempted where it was "directed at . . . the control of rates and facilities of natural gas companies," which are "precisely the things over which FERC has comprehensive authority").

Similar to the antitrust laws in *Oneok,* the Franklin law targets the retail market. In its findings and conclusions, the state of Franklin emphasized its intentions to "[f]oster[] and

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[3] Although *Oneok* is a case focusing on the Natural Gas Act rather than the FPA, "the relevant provisions of the two statutes are analogous," and the Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298, n10.

incentiviz[e] the development of distributed energy resources (DERs) within Franklin" to "increase the resilience of the electric grid, reduce transmission and distribution costs, and provide additional tools for customers to manage their energy costs." R. at 5. In fact, the law only operates to provide subsidies at the generation level. The "target" at which the Franklin law aims is solely that of the retail markets, and falls squarely within the realm left to states to regulate under the FPA. *See* R. at 5. Further, even if the subsidies at the generation level do have an "incidental effect" on the wholesale rates, which in turn "affect[s] the pool of bidders" in wholesale markets, the CAP Program is still too tangential and incidental to "directly affect" the clearing price, and therefore may not be preempted.

B. <u>The Section 1 CAP Program Is Not an "Obstacle" to the Objectives of Congress.</u>

The Supreme Court will deem something to be preempted in circumstances in which it is: "impossible for a private party to comply with both state and federal law . . . and where . . . the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. at 372-73 (brackets and internal quotation marks omitted). To determine whether there is an "obstacle" the "the federal statute [must be examined] as a whole . . . identifying its purpose and intended effects[.]" *Id.* at 373.

Nonetheless, conflict preemption "must be applied sensitively . . . to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515. A state law may be deemed to be conflict preempted if: (i) "it is impossible to comply with both state and federal law"; (ii) it "prevents the attainment of FERC's goals"; or (iii) its "impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Id.* at 516.

Section 1 of the EDEA is not conflict preempted for three reasons. First, it is not impossible to comply with both state and federal law because federal law does not preclude the CAP Program. Second, the CAP Program does not preclude the fulfillment of FERC's goals because it allows for the "continued operations" of coal-fired generating plants and is neither contingent on clearing the market nor determinative based on the value of wholesale capacity prices. *See* R. at 6-7. Finally, the CAP Program will influence retail rates and is an "incident of efforts to achieve a proper state purpose." *See Nw. Cent. Pipeline Corp.*, 489 U.S. at 516; R. at 6-7.

1. The CAP Program does not prevent compliance with federal law.

Although FERC has exclusive authority over interstate rates, this does not extend to include "exclusive control over any and every force that influences interstate rates." *Solomon*, 766 F.3d at 255. Outside of the scope of FERC's jurisdiction, but within the ambit of the states' jurisdiction, is the regulation of electricity retail sales. *Hughes*, 136 S. Ct. at 1292. States may act within their authority to "incentivize the construction of new generation facilities, limit new construction to certain types of generation resources, and require the retirement of generation facilities" which may result in "an indirect effect on the wholesale capacity market." Amicus Brief of United States at 32, *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), (Nos. 14-614, 14-623), 2016 WL 344494.

The goal of Section 1 of the EDEA is "to allow existing coal-fired generation to continue to operate" because without such incentives, Franklin faces possible deficiencies in capacity, thereby endangering reliability and price stability. R. at 4. This may indirectly influence the wholesale capacity market; however, this is not a type of financial incentive that courts have deemed preempted.

In *Hughes*, the Supreme Court had a limited holding in which they invalidated Maryland's program since it "disregards an interstate wholesale rate required by FERC." *Hughes*, 136 S. Ct.

at 1299. Justice Thomas notes in his concurrence that "the Court applie[d] the FPA's framework . . . [and] also relies on principles of implied pre-emption" in its determination that Maryland's program interferes with "federal jurisdiction over wholesale electricity rates." *Hughes*, 136 S. Ct. at 1301 (Thomas, J., concurring).

In *Nazarian*, the court found that there was conflict preemption due to: (i) "[a] conflict with the auction rates approved by FERC[,]" and (ii) the twenty-year subsidy duration conflicting with the designated three-year period for eligible new generators "to receive a fixed price for the capacity they sell in the PJM markets." *Nazarian*, 753 F.3d at 479. *Nazarian's* holding was narrow, noting that "not every state regulation that incidentally affects federal markets is preempted," as this result undercuts "Congress' specific grant of power to the States to regulate production[.]" *Nazarian*, 753 F.3d at 479–80 (quoting *Nw. Cent. Pipeline Corp.,* 489 U.S. at 515).

Unlike in *Nazarian*, Franklin's CAP amounts are neither determinative based on capacity prices nor contingent clearing on the auction. *See* R. at 6-7. Rather, Section 1 of the EDEA allows for an "[e]ligible coal-fired generating plant" to obtain "financial assistance to sustain its continued operations, based on the Commission's analysis and findings with respect to such plant's projected energy, capacity and ancillary service revenues and projected fuel and operating and maintenance (O&M) costs," and it impacts retail prices. R. at 6. The CAP amounts are determined by the Commission considering:

> (i) the incremental capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity, (ii) the extent to which energy, capacity and ancillary services revenues of eligible coal fired generating plants are insufficient to allow such plants to continue operating, (iii) the impacts of such Payments on ratepayers within Franklin, and (iv) the public interest.

R. at 6-7. Therefore, unlike *Nazarian*, the CAP amounts are not determined based solely on the wholesale auction clearing prices, but rather on the factors listed above. *See* R. at 6-7. Thus, Section 1 does not serve as an "obstacle" to FERC's jurisdiction over wholesale rates.

The Court in *Solomon* reserved judgment on conflict preemption. 766 F.3d at 246. Instead, the Court affirmed that the New Jersey LCAPP was field preempted. *See id.* at 255. Nonetheless, the Court did note that "the law of supply-and-demand is not the law of preemption[,]" and "[w]hen a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." *Id.* The Court in *Solomon* rejects the argument that "PJM's markets preempt any state act that might intersect a market rule." *Id.*[4] Accordingly, the District Court erred in invalidating Section 1 based on the potential of the CAP Program to "interfere with the market signals." R. at 13. Where, as here, a law has only an "incidental[] [e]ffect[]" on interstate commerce, the program is not preempted, as compliance with both federal and state law is possible. *Nazarian*, 753 F.3d at 479 (quoting *Nw. Cent. Pipeline Corp.,* 489 U.S. at 515) ("Such an outcome. . . 'undermine[s] precisely the division of the regulatory field that Congress went to so much trouble to establish . . . , and would render Congress' specific grant of power to the States to regulate production virtually meaningless.'")

2. The CAP Program does not preclude the fulfillment of FERC's goals.

"Unless clear damage to federal goals would result, FERC's exercise of its authority must accommodate a State's regulation" of an area within the state's authority to regulate, such as "production." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 522. FERC has the goal of "ensur[ing] an economically efficient PJM market." Amicus Brief of United States at 18, Hughes, 136 S. Ct. 1288, (Nos. 14-614, 14-623) . Additionally, FERC has the goal of "ensuring 'just and reasonable'

[4] Similar to the Circuit Court, the United States Supreme Court rejected this argument *sub silentio*. *See PPL EnergyPlus, LLC v. Solomon,* 766 F.3d 241 (3d Cir. 2014), *cert. den'd, CPV Power Holdings, LP v. Talen Energy Mktg., LLC*, 136 S. Ct. 1728, (2016).

wholesale rates" since it is a "central purpose of the [FPA]." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (internal citations omitted).

FERC has relied on "market mechanisms" as a means to certify the rates as "just and reasonable" instead of "directly approving or setting wholesale rates[.]" Amicus Brief of United States at 5, *Hughes*, 136 S. Ct. 1288, (Nos. 14-614, 14-623). PJM's Reliability Pricing Model ("RPM") is the capacity market that "ensures long-term grid reliability[.]" *Capacity Market (RPM),* PJM, http://www.pjm.com/markets-and-operations/rpm.aspx (last visited Feb. 11, 2017). Moreover, PJM's Minimum Offer Price Rule ("MOPR") is the tool PJM utilizes to promote a competitive wholesale market within the RPM auction. *See generally* PJM Open Access Transmission Tariff ("OATT"), at Attachment DD 5.14(h). Specifically, MOPR "is the mechanism that seeks to prevent the exercise of buyer market power in the forward capacity market by ensuring that all new resources are offered into PJM's Reliability Pricing Model (RPM) on a competitive basis." *PJM Interconnection, L.L.C., v. PJM Power Providers Grp.*, 137 FERC ¶ 61,145, at P 2 (2011). The rule was established to minimize the possible impairment of the capacity market due to the receipt of out-of-market subsidies on the part of new resources.[5]

MOPR pertains *exclusively* to new entrants:

> MOPR . . . addresses the concern that some market buyers may have an incentive to depress market clearing prices by offering supply at less than a competitive level. This incentive may occur when the reduction in capacity prices across the market participant's entire load achieved by a below-market bid for a *new generating resource* offsets any losses suffered on the individual *new entrant* being bid into the market below its true competitive cost.

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[5] *Resource Investment in Competitive Markets*, PJM Interconnection 37-8 (May 5, 2016), http://www.pjm.com/~/media/768E4AC9442A428AA83776AFDBF48929.ashx. PJM has acknowledged that "'state programs intended to support new generation entry through out-of-market payments to the generator. . . raise the price-suppression concerns that MOPR-type provisions are intended to address.'" *New Jersey Bd. of Pub. Utilities v. F.E.R.C.,* 744 F.3d 74, 89 (3d Cir. 2014) (citations omitted).

PJM Interconnection, 137 FERC ¶ 61,145, at P 24 (emphasis added). In this regard, MOPR requires "new generators to bid capacity into the auction at or above a price specified by PJM, unless those generators can prove that their actual costs fall below the MOPR price." *Hughes*, 136 S. Ct. at 1294. When a new generator clears the auction, the generator is regarded as "an efficient entrant," and is thereafter exempted from MOPR. *Id.* An exemption from MOPR allows for the ability to bid as a price-taker. *See id.* For instance, both existing generators as well as providers of capacity are permitted, as price takers, to bid at $0 and "agree to sell at . . . the clearing price." Amicus Brief of United States at 9, *Hughes,* 136 S. Ct. 1288, (Nos. 14-614, 14-623). FERC recognizes that MOPR is fundamental in ensuring that "wholesale prices are just and reasonable" and it allows for new entry at times when new capacity is required. *PJM Interconnection,*137 FERC ¶ 61,145, at P 2. Furthermore, the success of the PJM market is dependent on "competitive offers from new entrants." *Id*.

MOPR does not conflict with Section 1 of the EDEA because it does not apply to *existing resources* that have successfully cleared the capacity auction. *See id.* at P 128. When a new resource clears an auction at the MOPR price floor, "the resource has demonstrated that it is needed by the market" and "there is no reasonable basis for continuing to apply the MOPR to it." *PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,022 at P 175 (2011); *on reh'g*, 135 FERC ¶ 61,228, *on reh'g,* 137 FERC ¶ 61,145 (2011), *aff'd sub nom. New Jersey Bd. of Pub. Utils. v. FERC,* 744 F.3d 74 (3rd Cir. 2014).

The CAP Program is not preempted because the payments provide "financial assistance to sustain . . . continued operations" and affect the retail rates. R. at 6. Thus, there is not "clear damage to federal goals," *Nw. Cent. Pipeline Corp.*, 489 U.S. at 522, when allowing for these out-of-market payments to existing generation. This is because the mechanism by which FERC

ensures against buyer market power, MOPR, does not apply here. *See PJM Interconnection,* 137 FERC ¶ 61,145 at P 2.

3. The CAP Program achieves a "proper state purpose."

Under a dual regulatory system, when state law influences areas within the ambit of FERC's authority, "the State's purpose must be to regulate production or other subjects of state jurisdiction, and the means chosen must at least plausibly be related to matters of legitimate state concern." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 518.

In *Nw. Cent. Pipeline Corp.,* the Court held that regulation that allowed "for the permanent cancellation of producers' entitlements to quantities of Kansas-Hugoton gas" did not contravene the Supremacy Clause. 489 U.S. at 497. The Court recognized the regulation's purpose as a matter that States often address in regulating production: "to protect the correlative rights of Kansas producers." *Id.* at 518. Since there was evidence of this purpose, the Court did not deem the regulation to "lack[ ] a proper state purpose, nor [one] that it is so weakly related to such purpose that . . . it must be pre-empted." *Id.* at 519.

Similar to *Nw. Cent. Pipeline Corp.*, Franklin has an important state purpose pertaining to the enactment of Section 1 of the EDEA. The legislature made the finding that the mid-Atlantic region has suffered substantial losses of electrical generation capacity resulting from the retirement of coal-fired generation plants. R. at 4. There is an anticipation that more coal-fired generating plants will retire in the future, affecting Franklin's access to a reliable and sufficient supply of electricity. R. at 4. The possibility of retirement of more coal-fired generating plants will hinder Franklin's economic growth as well as the employment prospects for its citizens. R. at 4. Accordingly, the public interest will be served by allowing the CAP Program to provide financial assistance. R. at 4. This will also foster economic development due to the assurance of "a reliable

and reasonably priced electricity supply." R. at 4. Thus, Section 1 of the EDEA is not conflict preempted for lack of a "proper state purpose."

II. EDEA SECTIONS 2(A), (B) ARE CONSTITUTIONALLY VALID UNDER THE COMMERCE CLAUSE.

The District Court erred in its ruling when it held that the EDEA violated the dormant Commerce Clause. R. at 12-13. Sections 2(a), (b) do not violate the Commerce Clause as the state of Franklin was well within its authority to regulate intrastate activities, including modifying its existing Renewable Portfolio Standards ("RPS"). In addition, the District Court should not have reached the issue of whether Sections 2(a), (b) violate the dormant Commerce Clause, because the Electricity Producers Coalition ("Coalition") lacks standing to bring such a claim. In the analysis below, the state of Franklin's argument is twofold: (i) the Coalition does not have standing to bring a claim against Sections 2(a), (b) under the Commerce Clause; and (ii) the EDEA is in full compliance with the Commerce Clause.

A. The Coalition Lacks Standing to Bring a Claim Against Sections 2(a) and 2(b).

In order to bring a claim against Section 2 of the EDEA, the Electricity Producers Coalition [the Coalition] must first demonstrate that they can meet the requisite standing requirements. The Supreme Court has explained that elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . ." *Lujan v. Defs of Wildlife*, 504 U.S. 555, 561 (1992).

The Supreme Court has explained that the "gist of the question of standing" is whether a plaintiff possesses a sufficient "personal stake in the outcome of the controversy[.]" *Massachusetts v. Envtl Prot. Agency*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The criteria for standing is as follows: (i) "the plaintiff must have suffered an

injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical"; (ii) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (iii) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotations omitted).

Sections 2(a), (b) regulate the distribution utilities, not the Coalition, nor its members. Where the plaintiff is the regulated entity under a given law there is often little question that the plaintiff has suffered an injury. *Id.* at 561-62. However if, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed." *Id.* at 562. "Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). In addition, Sections 2(a), (b) do not "injure[] [the Coalition] in a concrete and personal way." *Id.* at 581. To the extent that the Coalition's members may be indirectly affected by the modified RPS, the Coalition has not demonstrated how such an injury would be "actual or imminent." *Id.* at 560. Instead, any injury to the Coalition and its members would be merely "conjectural or hypothetical." *Id.* The Coalition therefore lacks standing to bring a claim against the Sections 2(a), (b) of the EDEA under the Commerce Clause.

B. The Section 2(a) RPS Modification Does Not Discriminate Against Interstate Commerce, while the Section 2(b) Modification Serves a "Legitimate Local Purpose" to which there is No Less Discriminatory Alternative.

The Commerce Clause provides Congress with the power "[t]o regulate commerce with foreign nations, and among several States, and with Indian tribes[.]" U.S. Const. art. I, § 8, cl. 3. The Supreme Court has held that "[i]t is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the states to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1982). Therefore, the Commerce Clause carries a "negative" implication, commonly referred to as the dormant Commerce Clause, which forbids state discrimination against interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 95 (1994).

The Supreme Court has utilized two different standards of review under the dormant Commerce Clause, based upon the characteristics of the state action at issue. *See id.* at 99. A state law is categorized as either: (i) "regulate[ing] evenhandedly with only 'incidental' effects on interstate commerce;" or (ii) "discriminat[ing] against interstate commerce either on its face or in practical effect[.]" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Those laws falling within the former category, non-discriminatory laws, are "valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Where a non-discriminatory law is identified and a legitimate local interest is present, the state law is presumed constitutional, thereby placing the onus on the party opposing the state law to overcome this balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970). Conversely, those laws falling within the latter category, discriminatory laws, "will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."

Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992). The state law will be upheld if a state can show "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Therefore, while discriminatory state laws receive strict scrutiny review, the state law may still be held constitutional. *See e.g. Maine v. Taylor*, 477 U.S. 131 (1986) (The Court upheld Maine law that sought to protect its natural resources under the more rigorous strict scrutiny standard).

1. Section 2(a) does not discriminate against interstate commerce.

Section 2(a) of the Act is the first of two amendments to Franklin's existing RPS. Section 2(a) requires "electric distribution utilities to procure a specified percent of their electricity supply for retail customers within Franklin from electric generating plants fired with a fuel supply comprising coal and no less than 15 percent certified biomass feedstock." R. at 8. Pursuant to Section 2(a)(4), in order to meet this requirement, the biomass must come from, "[a]n area within the State of Franklin *and the adjoining states* . . ." that meets both environmental and economic standards. Section 2(a)(4) (emphasis added).

a. Section 2(a) is a non-discriminatory law under dormant Commerce Clause precedent.

Section 2(a) of the EDEA does not discriminate "either on its face or in practical effect," *see Hughes v. Oklahoma*, 441 U.S. at 336, and is therefore a nondiscriminatory law. State laws that have been held to discriminate on their face expressly forbid the participation of out of state competition, thereby creating economic protectionism. *See generally Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (finding economic protectionism in a New Jersey law that prohibited the importation of any waste from outside the state); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (invalidating a New Hampshire law that prohibited the exportation of hydropower produced within the state to another state without first obtaining approval). However, "a regulation

is not facially discriminatory simply because it affects in-state and out-of-state interests unequally." *Rocky Mountain Farmers Union v. Corey,* 730 F.3d 1070, 1089 (9th Cir. 2013). Furthermore, laws that discriminate in their practical effect are those laws that utilize regulatory mechanisms to prevent out of state competition from entering the state. *See generally Hunt v. Washington State Apple*, 432 U.S. 333 (1977) (finding a North Carolina law that required out of state apple shipments to contain a specific label that Washington apples did not possess to be a discrimination by effect).

Contrary to laws that discriminate on their face or in their practical effect, Section 2(a) of the EDEA contains facial *inclusion* of out of state competition, and its direct effect has been shown to allow out of state competition to participate within the modified RPS structure. *See* R. at 9. Section 2(a)(4) defines a Certified Biomass Region as an area within Franklin *and the adjoining states*. R. at 9. Moreover, in June 2016 the DNR and FDC issued a joint "Biomass Eligibility Determination Order" which designated two biomass regions, including the Franklin-Alleghany State Forest. R. at 9. Franklin and the state of Vandalia share this forest's lands. R. at 9. Therefore, the District Court erred in determining that Section 2(a) places a discriminatory, geographical limitation that burdens out of state biomass producers. R. at 13. The possibility for out of state participation under 2(a), in addition to the realized participation of biomass producers from Vandalia demonstrates that Section 2(a) does not discriminate "either on its face or in practical effect." *See Hughes v. Oklahoma*, 441 U.S. at 336.

b. Section 2(a) withstands the lower standard of review.

Where a state law does not discriminate on its face or its practical effect, but is instead an "evenhanded[]" law with only incidental effects on interstate commerce, courts apply a less rigorous standard of review. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (referencing *Pike*, 397 U.S. at 142). In *Oregon Waste Systems*, the Supreme

Court stated that such non-discriminatory laws are presumed valid unless the party opposing the state regulation can demonstrate that the burden imposed is “clearly excessive in relation to the putative local benefits.” 511 U.S. at 99 (quoting *Pike*, 397 U.S. at 142). Furthermore, in *Pike*, the Supreme Court analyzed an Arizona law that regulated the shipment of fruit, including to out of state purchasers. *See* 397 U.S. at 138. Finding the law of a non-discriminatory nature, the Court stated that if “a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated . . . depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Pike,* 397 U.S. at 142.

Constitutional presumption, coupled with the fact that Section 2(a) imposes excessive *benefits* while making marginal impacts on interstate commerce demonstrates that Franklin is in full compliance with the Commerce Clause. The local benefits provided through Section 2(a) are quite substantial. In *PPL Energy v. Hanna*, the District Court of New Jersey held that a New Jersey law that mandated distribution utilities purchase capacity from new natural gas facilities within the state *at a designated price* did not violate the dormant Commerce Clause. 977 F.Supp.2d 372, 412 (D.N.J. 2013) (emphasis added). The court upheld the law citing a number of factors including: (i) FERC’s inability to order new generation; (ii) the fact that PJM pricing mechanisms allow for different prices of energy within the region due to transmission costs; and (iii) New Jersey faced potential capacity deficiencies that threatened electric reliability and security. *See id*. Franklin, as demonstrated through the preamble to the EDEA, cites all of these considerations for the enactment of the Act. *See* R. at 4-5. Additionally, the New Jersey law imposed a larger impact on interstate commerce as it provided a pricing mechanism. *Hanna*, 977 F.Supp.2d at 393 (requiring distribution utilities to “pay any difference between the RPM Auction

price and [the generators'] actual development costs[]"). The absence of any pricing mechanisms within Section 2(a), coupled with the same local interests demonstrates that the EDEA's local benefits greatly outweigh any impact on interstate commerce. Therefore, Section 2(a) is constitutional.

c. Section 2(a) further withstands strict scrutiny review.

Even under the more rigorous standard, Section 2(a) passes constitutional muster. Under the more rigorous strict scrutiny standard, a state law may be upheld where a state can demonstrate a local benefit and a lack of nondiscriminatory alternatives. *See New Energy*, 486 U.S. at 278. In *Maine v. Taylor*, the Supreme Court upheld a Maine statue that forbid the importation of baitfish because "[a]s long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' . . . it retains broad regulatory authority to protect the health and safety of its citizens and the *integrity of its natural resources*." 477 U.S. 131, 151 (1986) (emphasis added) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). Similar to the Maine law, the state of Franklin seeks to protect its natural resources by promoting more environmentally friendly standards for electrical generation. R. at 4. Furthermore, the state of Franklin cites a number of other local benefits including the continued integrity of the coal industry, electricity reliability and security, and economic development. *See* R. at 3-5. Section 2(a), through its expansion of the RPS provides the distribution utilities with access to coal plants that utilize out of state biomass producers, creating a regulatory framework that balances all of these pertinent, local interests. *See* R. at 8-9. There is no evident, reasonable alternative to the way in which Section 2(a) serves Franklin.

2. Section 2(b) serves a legitimate "local purpose" to which there is no nondiscriminatory alternative.

Section 2(b) of the EDEA is the second of the two modifications to Franklin's existing RPS. In Section 2(b) the distribution utilities are required to purchase a designated amount of capacity from customer-sited combined heat and power or cogeneration facilities that utilize biomass. *See* R. at 4. Section 2(b) is distinguishable from 2(a) in two pertinent ways. First, 2(b) does not require the biomass used by customers to be "certified biomass feedstock." R. at 10. Second, Section 2(b) creates a "customer carve-out" which by definition only allows in-state customers to participate. R. at 10.

Franklin's RPS, enacted in 2007, applies to the five electric distribution utilities within the state. R. at 8. Because the RPS only binds distribution utilities, Section 2(b) passes the strictest level of scrutiny. Where a state law is found to discriminate against interstate commerce, either on its face or in its practical effect, a state must demonstrate an interest aside from simple economic protectionism. *Wyoming v. Oklahoma*, 502 U.S. at 454. Indeed, Section 2(b) is not an attempt by the legislature to simply establish economic protectionism. As stated within the EDEA Preamble, distributed energy resources (such as those contemplated within 2(b)) "increase the resilience of the electric utility grid, reduce transmission and distribution costs, and provide tools for customers to manage their energy costs." R. at 5. The legislature further cites additional benefits such as environmental responsibility and the advancement of a diverse energy portfolio. R. at 4-5. Section 2(b) is therefore not an attempt by the state to establish economic isolation, but rather a law that provides a number of benefits that extend to both the state of Franklin, as well as other states within the PJM region.

Additionally, the state of Franklin has demonstrated "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New*

Energy Co., 486 U.S. at 278. There is an abundant amount of legitimate local purposes and benefits that are supported through the enactment of Section 2(b). The Franklin legislature has determined that customer-sited generation provides ample benefits. *See* R. at 5. As discussed, the State of Franklin has designed its RPS mandates to apply to the five distribution utilities within the state. R. at 8. These distribution utilities, by definition do not have any out of state customers. R. at 10. Furthermore, because the RPS structure only applies to distribution utilities, it is virtually impossible for any customer carve-out to contemplate the participation of out of state customers. Therefore, there is no nondiscriminatory alternative that the legislature can adopt to further the legitimate local interest of customer sited generation that provides increased distributed energy resources to the state and PJM region.

SEVERABILITY

In the event that any section of the EDEA is determined to be invalid, illegal or unenforceable for any reason, the state of Franklin respectfully requests that the remaining provisions of this statute shall remain in effect to the fullest extent permitted by law.

CONCLUSION

For the reasons stated, the Court should vacate the District Court's ruling.

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. 13