IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

State of Franklin, Appellant	)	
v.	)	Case No. 16-01234
Electricity Producers Coalition, Appellee	)	

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

BRIEF FOR APPELLEE

Team No. 19
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES:

OTHER DOCUMENTS:

JURISDICTIONAL STATEMENT

This case was filed in the district court under 28 U.S.C. §1331, raising constitutional challenges to Franklin's EDEA. The district court issued final judgment on November 7, 2016. The State of Franklin filed a timely appeal and this Court issued an order on January 6, 2017 granting appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1295.

STATEMENT OF THE CASE

The Federal Power Act ("FPA") vests in the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over wholesale sales of electricity in the interstate market, but leaves regulation of retail electricity sales to the states. *FERC* v. *Electric Power Supply Assn.*, 136 S. Ct. 760. In states that have deregulated their energy markets, distribution utilities purchase electricity at wholesale from independent power generators for delivery to retail consumers.

Interstate wholesale transactions in deregulated markets typically occur through (1) bilateral contracting, where LSEs agree to purchase a certain amount of electricity from generators at a certain rate over a certain period of time; and (2) competitive wholesale auctions administered by Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"), nonprofit entities that manage certain segments of the electricity grid. PJM Interconnection ("PJM"), an RTO overseeing a multistate grid, operates a capacity auction. The capacity auction is designed to identify need for new generation and to accommodate long-term bilateral contracts for capacity.

Concerned that the PJM capacity auction was failing to encourage development of sufficient new in-state generation, Franklin enacted Energy Diversification and Expansion Act ("EDEA"), which is a regulatory program with a goal of preserving economic viability of coal-fired plants and stimulating development of biomass industry.

Electricity Producers Coalition ("EPC") commenced action after Franklin Public Service Commission ("PSC") issued EDEA Implementation. EPC sought declaratory ruling that 1) Section 1 of the EDEA violates the Supremacy Clause of the United States Constitution, given FERC's exclusive authority over "the sale of electric energy at wholesale in interstate commerce; 2) the modifications to Franklin's Renewable Portfolio Standard ("RPS") violate the Dormant Commerce Clause given their discriminatory impact on interstate commerce; and 3) EPC also sought injunctive relief to prevent the EDEA from being implemented until the legal issues could be resolved.

The District Court granted EPC's motion for Summary Judgment, finding that 1) Section 1 of the EDEA is "field preempted" under the Supremacy Clause because FERC has exclusive jurisdiction under the FPA with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce; 2) Section 1 is also "conflict preempted" under the Supremacy Clause because FERC has determined that market-based processes approved and overseen by FERC are the best way to bring more efficient, lower cost power to U.S. electricity customers; 3) Section 2(a) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "certified biomass feedstock" under the EDEA is limited to areas primarily located within the state of Franklin; and 4) Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because of the geographic limitation of "eligible facilities" to customer-sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin.

The State of Franklin now appeals to the Twelfth Circuit.

STATEMENT OF FACTS

In January 2016, Franklin attempted to overstep its jurisdiction and enact the Energy Diversification Expansion Act ("EDEA") with the goal of preserving the economic viability of the existing coal-fired generating plants and stimulating the development of a biomass industry. (R. at 3). The EDEA has three elements: 1) Providing for financial incentives, in the form of Carbon Assistance Payments, or "CAPs," to eligible coal-fired generating plants serving Franklin, with the Franklin Public Service Commission ("PSC") charged with determining power plant eligibility and setting the level of CAPs, in accordance with the standards enunciated in the Act [EDEA, Section 1] (R. at 3); 2) Modifying Franklin's existing Renewable Portfolio Standard ("RPS") to impose a requirement on electric distribution companies to procure a portion of their electricity supply from electric generating plants that are co-fired with both coal and biomass and, more specifically, that the biomass portion be "certified biomass feedstock" constituting no less than 15 percent of a generating plant's fuel supply [EDEA, Section 2(a)] (R. at 4); and 3) Modifying Franklin's existing RPS to include a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass [EDEA, Section 2(b)] (R. at 4).

Section 1 of the EDEA governs the CAP program. Franklin PSC first would determine eligibility of coal-fired generation plants by considering location, fuel source, and whether or not the plant requires financial assistance to sustain operations. Once PSC determines eligibility, it will determine price consideration by considering operating costs compared to competing sources of electricity. (R. at 6, 7). CAPs will then be administered as such: 1) The State Energy Office will offer a ten-year contract, the annual amount of which would be capped at the megawatt hour (MWh) amount that represents whatever contribution a unit has made to the electricity generating mix; 2) The SEO would then collect money through assessments against

the five electric distribution utilities operating within Franklin; 3) Last, the PSC would, in turn, set rates for each utility that would enable such utility to recover the costs of its CAP assessment loss. (R. at 7).

The Renewable Portfolio Standard requires utilities selling electricity to customers to generate or purchase a portion of its electricity supply from renewable sources. (R. at 8). The EDEA created two changes to the Renewable Portfolio Standard. Section 2(a) of the EDEA requires the electric distribution companies operating within Franklin to procure a specified percentage of their electricity from plants fired with coal and no less than 15 percent certified biomass feedstock. (R. at 8). That specified percentage is 3 percent in the beginning of 2020 and 5 percent by 2030. (R. at 8).

Section 2(a)(3) of the EDEA defines certified biomass feedstock as biomass feedstock harvested from a designated biomass growing region. (R. at 8). Section 2(a)(4) of the EDEA states that a designated biomass growing region is "an area within the state of Franklin and the adjoining states." (R. at 9). Also, the biomass must be suitable for sustainable harvest and it must be an economically depressed area. (R. at 9). There were only two areas that satisfied the definition set under section 2(a)(4) that accumulated to 1178 acres with only 256 acres in an adjoining state. (R. at 9).

Section 2(b) of the EDEA created a carve-out for customer cited CHP facilities fueled with biomass that are connected to the distribution grid of an electric distribution utility serving customers within Franklin. (R. at 10). The procurement requirement for section (2)(b) is set at half a percent beginning in 2020 and 1 percent by 2030. (R. at 10). These CHP facilities were required to be located on the customer side of the meter and be connected to a distribution grid. (R. at 10). CHP facilities by definition are located solely within the State of Franklin. (R. at 10).

SUMMARY OF ARGUMENT

The Supremacy Clause of the United States Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. 6, cl. 2. When Congress enacted the FPA in 1935, it intended to authorize federal regulation of interstate, wholesale sales of electricity — a precise subject matter beyond the jurisdiction of the States. Specifically, the FPA gave the Federal Power Commission, the predecessor agency to FERC, jurisdiction over the regulation of interstate wholesale sales of electricity and of interstate transmissions of electric energy. *See* 16 U.S.C. § 824(a). While Franklin's actions of setting retail rates for its utilities is permissible, the action of subsidizing generation facilities and providing them with out-of-market funds through the CAP, is not permissible. This action is preempted by federal regulation, because the CAP effectively distorts the market price signals that FERC relies on to set fair and reasonable wholesale rates. This interference is a clear violation of the Supremacy Clause and is therefore preempted.

The Commerce Clause gives Congress the authority "to regulate Commerce … among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. Under this authority lies the Dormant Commerce Clause which restricts states from burdening interstate commerce with regulations that are discriminatory to other States. The EDEA enacted by the State of Franklin is a discriminatory act that violates the Dormant Commerce Clause. Under the Dormant Commerce Clause "we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well

without discriminating against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Section 2(a) and section 2(b) of the EDEA are in violation of the rule set out in *Hughes.* Section 2(a) and 2(b) facially discriminate against interstate commerce due to the overall economic isolation that the acts create. There are multiple legitimate local purposes that can satisfy the second element of *Hughes* but due to the overall economic protectionist motives of the State of Franklin; section 2(a) and 2(b) do not qualify as legitimate. Lastly, there were countless non-discriminatory alternatives that the State of Franklin could have pursued yet chose not to. Since section 2(a) and 2(b) of the EDEA did not satisfy the three element test set out in *Hughes* and was a burden on interstate commerce, the sections are unconstitutional under the Dormant Commerce Clause.

STANDARD OF REVIEW

This Court reviews constitutional questions *de novo*, deferring to factual findings unless they are clearly erroneous. *United States v. Grimmond*, 137 F.3d 823, 827-31 (4th Cir. 1998). This Court exercises *de novo* review of all issues.

ARGUMENT

I. SECTION 1 OF THE EDEA IS FIELD PREEMPTED BECAUSE IT INTRUDES UPON A FIELD EXCLUSIVELY REGULATED BY FERC.

Under the FPA, FERC has exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce. 16 U.S.C.S. § 824(b)(1). A wholesale sale is defined as a sale of electric energy to any person for resale. 16 U.S.C.S. § 824(d). The FPA assigns to FERC responsibility for "ensuring that all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of FERC shall be just and reasonable." 16 U.S.C.S. § 824d(a). The FPA also assigns states exclusive jurisdiction to regulate any retail sale of electricity. 16 U.S.C.S. § 824(b)(1). However, a state law can be subject to preemption; thus, "state law is [field] pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79.

Throughout case precedent, courts have distinguished federal jurisdiction and state jurisdiction when it comes to setting rates. The court in *PPL Energyplus, LLC v. Nazarian* was presented with the issue of whether Maryland's Generation Order was a violation of the Supremacy Clause and therefore preempted. *Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 840 (Md. 2013). In essence, the Generation Order resulted in a contract between one of Maryland's distribution utilities and a generation facility. *Id.* The contract provided that regardless of the price set by the federally regulated wholesale market, the Maryland utilities

would assure that the generation facility received a guaranteed price fixed by a contractual formula. *Id.* The court agreed that the FPA preserves states' jurisdiction over certain direct regulation of physical generation facilities, but articulated, "once a generation facility operates and participates in the wholesale electric energy market, the prices or rates received by that generator in exchange for wholesale energy and capacity sales are within the sole jurisdiction of the federal government." *Id* at 829.

Here, Franklin has implemented CAP, which operates similarly to Maryland's Generation Order. First, the Franklin State Energy Office (SEO) would enter into a ten-year contract with a qualifying generation plant; second, the SEO would collect revenue from distribution facilities to give to the generation plant; and third, the Franklin PSC would set retail rates that were high enough to ensure the distribution facilities could recover the money that was taken by the SEO. (R. at 7). Essentially, under the CAP, Franklin SEO is ensuring a generation facility a guaranteed price, regardless of the price set by FERC. Franklin's action of setting retail rates for its distribution utilities is not what is being challenged – that action is explicitly allowed by the FPA. As the District Court correctly concluded, the problem is that, under the CAP, Franklin will be providing revenue to generation facilities, which will in turn have the effect of interfering with wholesale power markets...inasmuch as the coal-fired plants receiving CAPs will be receiving substantial out-of-market payments that will effectively set a higher, above-market price for electricity sold. (R. at 13). The effect the CAP will have on wholesale rates is clear and there is no question that the FPA grants exclusive authority to FERC to regulate wholesale rates; therefore, the CAP is undoubtedly preempted.

II. SECTION 1 OF THE EDEA IS CONFLICT PREEMPTED BECAUSE FERC HAS USED ITS EXPERTISE IN SETTING WHOLESALE RATES AND THE CAP PROGRAM UNDERMINES FERC'S DETERMINATIONS BY SKEWING PRICE SIGNALS AND THROWING THE AUCTION'S MARKET-BASED PRICE-SETTING MECHANISM OUT OF BALANCE.

When a state regulation threatens to interfere with a federal regulation, the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence." *Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.(In re Cal. Wholesale Elec. Antitrust Litig.)*, 244 F. Supp. 2d 1072 at 1082. Even if Congress has permitted concurrent regulation within a particular field, state action is preempted if it interferes with, or even potentially interferes with, federal authority. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 at 310. As a regulatory agency, "FERC is not required to adhere rigidly to a cost-based determination of rates." *Farmer's Union Cent. Exch., Inc. v. FERC,* 734 F.2d 1486 at 1502. Rather, FERC's regulatory scheme includes an auction-based market mechanism to ensure wholesale rates that are just and reasonable. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 at 1291.

States haven't always agreed with this regulatory scheme, however. In *Hughes,* Maryland enacted its own regulatory program because it felt that FERC's rates did not provide sufficient incentive for new electricity generation in the state. *Id*. at 1292. Maryland's program provided subsidies to generation facilities. In one of its Orders, FERC explained that "giving certain generation facilities subsidies would improperly favor new generation over existing generation, throwing the auction's market-based price-setting mechanism out of balance." *See PJM*, 128 FERC ¶61,157 (2009). The court concluded that Maryland's program "has the potential to seriously distort the PJM auction's price signals," and "impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to FERC alone." 136 S. Ct. 1288 at 1292.

Here, the conflict with federal law is clear. Franklin adopted its own regulatory scheme to override FERC's rates. Franklin's decision displaces FERC's preferred rates and terms. A principal aim of the PJM auction is to achieve what FERC has declared a "superior balance" between new and existing generation, which it maintains through both non-discriminatory prices and a limited NEPA exception. *PJM*, 126 FERC ¶61,275, at ¶150. Yet the express purpose of the CAP is to use a 10-year price guarantee to skew the market dramatically in favor of new resources. This case is comparable to *Hughes* in that both Franklin and Maryland attempted to alter FERC's regulatory scheme. *Hughes* guides this court in finding that Franklin's CAP is conflict preempted.

III. THE DRORMANT COMMERCE CLAUSE CONSIDERS STATE LAWS THAT DISCRIMINATE AGAINST INTERSTATE COMMERCE FACE A VIRTUALLY PER SE RULE OF INVALIDTY.

The Commerce Clause gives Congress the authority "to regulate Commerce … among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. The Supreme Court has made it abundantly clear that the Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 34 (1980). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). When a state statute clearly discriminates against interstate commerce, the law will be struck down unless the discrimination is justified by a valid factor unrelated to economic protectionism. *See, Maine v. Taylor*, 477 U.S. 131 (1986). The Supreme Court has stated that state laws that discriminate against interstate commerce face a virtually per se rule of invalidity. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under the Dormant Commerce Clause "we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on

interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

A. Section 2(a) of the EDEA puts a burden on interstate commerce.

The State of Franklin requiring 3 percent in 2020 and 5 percent in 2030 of its coal firing plants to have no less than 15 percent certified biomass feedstock that can only be obtained in a "Designated Biomass Growing Region" that are primarily located within the State of Franklin puts a burden on interstate commerce that is facially discriminatory. Section 2(a) of the EDEA modified Franklin's Renewable Portfolio Standard to require "electric distribution utilities to procure a specified percentage 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 8:24-27.) Section 2(a)(3) defines "certified biomass feedstock" as "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 8:32-36.) Section 2(a)(4) describes the "Designated Biomass Growing Region" as "an area within the state of Franklin and the adjoining states…" (R. at 9:2.)

The "Designated Biomass Growing Regions" that are considered sufficient to satisfy the requirements imposed by the EDEA are comprised almost solely of State of Franklin Biomass. Out of the 1178 acres available, only 256 acres are located within another state. The Supreme Court has made it understood that "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia v. New Jersey*, 437 U.S. 617, 622 (1978). Biomass, mostly located within Franklin and a tiny section of an adjoining

state, certainly has an effect on interstate market and is therefore reviewable under the Dormant Commerce Clause.

Appellant may claim that the EDEA does not place an overall burden on interstate commerce due to it dealing with only a small portion of the State of Franklins energy market. This claim would be considered wrong under the Dormant Commerce Clause. "The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992). In other words it does not matter how small the discrimination is when determining if a State has discriminated against interstate commerce.

B. Section 2(a) of the EDEA is facially discriminatory.

The Supreme Court in *Wyoming* held that an Oklahoma act requiring Oklahoma electric coal fired plants to run on at least 10 percent Oklahoma coal is unconstitutional under the Dormant Commerce Clause. 502 U.S. 437, 455 (1992). The Supreme Court considered this act both on its face and in practical effect to be discriminatory against interstate commerce. The Oklahoma act expressly reserved a portion of the Oklahoma coal market for Oklahoma mined coal, but to the exclusion of coal mined in other states. "Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Id.*

By the State of Franklin requiring a percentage of electric providers to provide coal generated electricity that is 15 percent biomass which is almost solely available in the State of Franklin, the State of Franklin has done the exact same thing as Oklahoma did but with biomass. Section 2(a) of the EDEA is an obvious preference for biomass from a domestic source which cannot be characterized as anything other than protectionist and discriminatory. Section 2(a) of

the EDEA expressly reserved a portion of the State of Franklin co-generation market for State of Franklin biomass, to the exclusion of biomass in the vast majority of the other States.

The Appellant may counter that Section 2(a) of the EDEA does not discriminate against other states since an insignificant portion of approved "Designated Biomass Growing Regions" lie in another state. The Supreme Court considers a state law to violate the Dormant Commerce Clause regardless of if the law discriminates against all but one state or all other states. See, *New Energy Co. v. Limbach*, 486 U.S. 269, 275 (1988). The EDEA is discriminatory against all other states regardless of the fact that one other state may be able to participate in the State of Franklin co-generation market. The EDEA is no more than a sly attempt to forward the State of Franklins own economic protectionist ideals and is facially discriminatory under the Dormant Commerce Clause.

C. The State of Franklin lacks valid justification for EDEA Section 2(a) and has multiple non-discriminatory alternatives to EDEA Section 2(a).

When a State law is considered facially discriminatory against interstate commerce, the law will be struck down unless the discrimination is justified by a valid factor unrelated to economic protectionism. See, *Maine v. Taylor*, 477 U.S. 131 (1986). When a state facially discriminates against interstate commerce "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 353 (1977).

Appellant may try to justify their discriminatory act by claiming that its purpose was to help the environment. That claim cannot stand when you look at the preamble of the EDEA. In Maine v. Taylor, the Supreme Court held that a regulation by the State of Maine which banned the importation of live baitfish was not unconstitutional even though it was facially

discriminatory. The Supreme Court held this way due to the evidence introduced in district court, where scientist claimed that the regulation was necessary to protect Maine's fragile fisheries.

We have no such evidence in this case. The intent of the Franklin legislature was not to protect the environment but to protect their own economic interests at the detriment of other states. Only twice does the preamble mention the environment. (R. at 4, 5.) The majority of the preamble discusses the economic benefits the State of Franklin will receive due to the changes under the EDEA. (R. at 4, 5.) This is exactly the type of economic protectionism that the Dormant Commerce Clause is supposed to prevent.

Lastly, the State of Franklin had multiple avenues to pursue that did not require such a burden on interstate commerce. For one, the State of Franklin could have given tax breaks to the coal fired plants to help expand the plants. The State of Franklin could have provided jobs programs to the areas with Franklin that have high rates of unemployment. The State of Franklin could have also given tax breaks to companies which sell biomass to lower prices for the coal fired plants. The point is, multiple actions could have been taken that were non-discriminatory to interstate commerce. The State of Franklin lacked valid justification for its discriminatory law and had multiple non-discriminative alternatives.

D. Section 2(b) of the EDEA puts a burden on interstate commerce.

Section 2(b) of the EDEA, changed the Renewable Portfolio Standard to create a "carve-out" for CHP's only located within the State of Franklin which is unconstitutional under the Dormant Commerce Clause. Section 2(b) of the EDEA changed the Renewable Portfolio Standard to require that half a percent beginning in 2020 and growing to 1 percent by 2030 of the renewable energy be procured from customer-cited CHPs, which can only be located in the State of Franklin. (R. at 10.)

The sale of electricity from CHPs, places a burden on interstate commerce just as the flow of any resource does. See, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The flow of electricity effects the electrical markets all over the United States. Not only through the change in prices paid by customers but also through the ability of other states to provide power to their citizens. It is without question that the flow of electricity from CHPs is a burden on interstate commerce. The appellant may counter this point by stating that the effect on interstate commerce is too minimal but as was said earlier it does not matter, to the determination of whether there is discrimination, the amount of discrimination. See, *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

E. Section 2(b) of the EDEA is facially discriminatory.

In Philadelphia v. New Jersey, the Supreme Court considered a law banning certain types of trash from other states as facially discriminatory under the Dormant Commerce Clause. The reason the Supreme Court found this way is because it viewed Philadelphia's actions as an attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Just as Philadelphia was not letting in out of state trash, a resource, the State of Franklin is not letting in out of state electricity, a resource, for a portion of their market. Economic interest in keeping utility prices low is a problem dealt with by every single state. This is not a problem that can be fixed by the State of Franklin can fix by requiring a certain percentage of co-generation electricity to be procured from within the state. This act is erecting a barrier against the movement of interstate trade. Any blanket act which blatantly prohibits out of state private companies from participating in a certain states market simply because they are out of state is the very definition of facial discrimination.

F. The State of Franklin lacks valid justification for EDEA Section 2(b) and has multiple non-discriminatory alternatives to EDEA Section 2(b).

When a State law is considered facially discriminatory against interstate commerce, the law will be struck down unless the discrimination is justified by a valid factor unrelated to economic protectionism. See, *Maine v. Taylor*, 477 U.S. 131 (1986). When a state facially discriminates against interstate commerce "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). There is no justification for an action such as this other than the economic protectionism of the State of Franklin. As stated above, this is not a valid excuse under the Dormant Commerce Clause.

There were multiple actions the state of Franklin could have took in order to strengthen the economy of their co-generated facilities. Tax breaks could have been given to the in state CHPs that used biomass. Also, the State of Franklin could have could have subsidized the biomass industry within the State of Franklin to make it cheaper to purchase for the CHPs. Other legislative incentives could have been put in place that were non-discriminatory to interstate commerce. The State of Franklin lacked valid justification for its discriminatory law and had multiple non-discriminative alternatives.

CONCLUSION

Section 1 of the EDEA is both field preempted and conflict preempted by FERC's exclusive jurisdiction. Section 2(a) and 2(b) of the EDEA burden interstate commerce, are facially discriminatory, lack valid justification, and there were multiple alternative to the EDEA that would have made the same if not a greater impact on the energy economy and overall economy of the State of Franklin. Since the EDEA satisfied the three element test set out in *Hughes,* the EDEA violates the Dormant Commerce Clause.

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

Team No. 19

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellee 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. 19