IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

State of Franklin, Appellant,	)	
v.	)	C.A. No. 16-01234
Electric Producers Coalition, Appellee.	)	

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

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Brief for Appellee

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STATEMENT OF JURISDICTION

This action was filed in the Federal District Court for the Eastern District of Franklin on July 1, 2016. The district court had jurisdiction over the subject matter under 28 U.S.C. § 1331, as the district court's federal question was based on violations of the Commerce Clause and Supremacy Clause powers of United States Constitution.

The district court issued a final order that Franklin appealed to this court. The appeal was filed on December 6, 2016. The Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, where appellate courts have jurisdiction over appeals from final orders issued by district courts.

STATEMENT OF THE ISSUES PRESENTED

I. Whether §1 of the EDEA is "field preempted" under the Supremacy Clause of the United States Constitution, given the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act concerning the sale of electricity and capacity at wholesale in interstate commerce.

II. Whether §1 of the EDEA is "conflict preempted" under the Supremacy Clause of the United States Constitution, given FERC's determination that market-based processes overseen by FERC are the preferred means of achieving reliable and reasonably-priced electricity.

III. Whether §2(a) of the EDEA violates the dormant Commerce Clause, given the geographic limitation of "Certified Biomass Feedstock" to areas overwhelmingly in the state of Franklin.

IV. Whether §2(b) of the EDEA violates the dormant Commerce Clause, given the inherent limitation that all customer-sited combined power and heat generators are located exclusively in Franklin.

STATEMENT OF THE CASE

Appellant State of Franklin enacted the Energy Diversification and Expansion Act (EDEA or the Act) in January 2016 to assist electricity plants serving Franklin through Carbon Assistance Payment (CAP) contracts for bidding into interstate wholesale electricity markets. The EDEA also requires electricity distributors serving Franklin customers to procure certain percentages of their fuel portfolio from certified areas identified by the Franklin Department of Natural Resources and Division of Commerce, and from electricity generators within Franklin. Appellee Electricity Producers Coalition (EPC) initiated this action on July 1, 2016, in the Federal District Court for the Eastern District of Franklin, seeking to hold the §1 of the EDEA preempted under the Supremacy Clause and §2 of the EDEA unconstitutional under the dormant Commerce Clause powers of the United States Constitution. The district court granted EPC's motion for summary judgment on both issues. The State of Franklin filed an appeal to this court.

STATEMENT OF THE FACTS

In January 2016, Franklin enacted the EDEA seeking to protect the economic viability of Franklin's coal-fired generating plants and take advantage of Franklin's vast forests. (R. 3). The Act contains three elements: (1) the payment of Carbon Assistance Payments (CAPs) to eligible coal-fired generating plants; (2) modification of Franklin's existing RPS to impose a mandate on electric distribution companies to procure a part of their electricity supply from generating plants

that are co-fired with both coal and biomass, as provided in EDEA §2(a); and (3) modification of Franklin's existing RPS to include a carve-out for customer-sited combined heat and power (CHP) facilities fueled with biomass, as provided in EDEA §2(b). (R. 3-4).

In enacting the EDEA, the Franklin legislature made several findings of import to the present case: (1) that the retirement of coal-fired generating plants has produced a loss of generation capacity and availability of an electricity supply, which threatens economic growth; (2) that the PJM capacity markets have not encouraged the development of new generation capacity or fostered the viability of existing coal-fired generation; (3) that developing new generation facilities will stabilize power prices and create employment opportunities in Franklin; (4) that integrating biomass into the fuel supply of coal-fired generating plants will both diversify the generating portfolio, thereby stabilizing power prices, and reduce greenhouse gas emission from coal-fired plants; and (5) that distributed energy resources (DERs), smaller-scale generating plants that are located closer to end-use customers, will increase availability of electricity supply to end-use consumers. (R. 4-5).

Pursuant to the Electric Customer Choice and Competition Act of 1996, the State of Franklin chose to introduce competition into its electricity market foregoing the historic integrated monopoly system previously it adopted. (R. 5). A brief discussion of the system is as follows: Franklin's market consists of a competitive interstate wholesale capacity market. (R. 5). Generators bid their capacity into the wholesale market, which is then purchased by Franklin distribution utilities to sell at retail value. (R. 5-7). The market, including capacity prices, is administered by the PJM Interconnection (PJM), an Independent System Operator appointed by the Federal Energy Regulatory Committee FERC, which also services thirteen other states. (R. 5). Under the Federal Power Act, FERC has jurisdiction over prices and regulations affecting said

prices in interstate wholesale markets. (R. 5, 11); 16 U.S. §824(b)(1). The PJM also includes twenty-one locational marginal pricing zones (LMPs), which are smaller geographic areas that deviate in price to reflect the market in that area— higher prices may signal the need for more infrastructure to carry capacity to the area or the need for a new generator of electric capacity to bring the cost down, while lower prices suggest a glut of capacity and force inefficient generators to retire. (R. 5-7). Relevant here are three LMPs located either entirely or partially within Franklin: Franklin East (entirely), Vandalia South (one-quarter in Franklin), and Allegheny North (one-third in Franklin). (R. 6).

The purpose of the CAPs are to provide incentives for coal-fired plants serving Franklin to remain economically feasible and to encourage new coal-fired plants to enter into the market. (R. 4). The EDEA gives the Franklin Public Service Commission (PSC) the "primary responsibility" to set CAPs prices and determine which facilities are eligible to receive the payments. (R. 6). Eligible plants are defined as:

> [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.

EDEA § 1(a)(6). Franklin's PSC collects CAP revenue through collecting funds from the distribution utilities operating in Franklin. (R. 7). Eligible facilities contract with the Franklin State Energy Office (SEO) to receive CAPs for ten year periods based on their contribution to capacity purchased for use in Franklin. (R. 7). The distribution utilities then recover their cost from retail prices purchased by consumers. (R. 7). Importantly, *only* coal-fired generators bidding into the

PJM market may receive CAPs. (R. 7) (emphasis added). The price at which CAPs rates are determined by:

> [Taking] into account (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 service 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.

EDEA § 1(a)(2).

When EPC brought this action federal court, the PSC determined five plants are eligible for CAPs: three within Franklin East, one within Vandalia South but outside of Franklin, and one in Allegheny North but within Franklin. (R. 7). The PSC also set the CAPs at $18.50/MWh, determined by comparing bids for capacity into the PJM market for coal-fired capacity versus non-coal-fired capacity. (R. 7-8).

Franklin's existing RPS was enacted in 2007, requiring the five electric distribution companies within Franklin to procure 20% of the electricity sold to customers in Franklin from renewable resources by 2020. That procurement increases to 30% by 2030. (R. 8). EDEA §2(a) modifies the existing RPS to include a new procurement obligation, namely, that electric distribution companies must procure 3% of the electricity sold to customers in Franklin from coal-fired generating plants that are fired with "no less than 15% certified biomass feedstock" by 2020. (R. 8). This new procurement obligation increases to 5% by 2030.

Certified biomass feedstock is defined under EDEA §2(a)(3): "'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." EDEA §2(a)(3). Designated Biomass Growing Region, in turn, 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, as determined by DNR's analysis of the recoverability of forest biomass, the suitability of forest residues as a feedstock for electricity generation, the long-term sustainability of using such feedstock for a fuel supply, and such other factors as DNR deems reasonable in its discretion, and (ii) the Franklin Division of Commerce as an economically depressed area, as determined by the Division's analysis of labor and employment trends, unemployment rates, average income, and such other factors as the Division deems reasonable in its discretion.

EDEA §2(a)(4).

After the EDEA was enacted, Franklin's Department of Natural Resources and Division of Commerce initiated a joint proceeding in in February 2016 to make certain determinations necessitated by the Act. (R. 9). In June 2016, the agencies issued their Biomass Eligibility Determination Order, which identified two Designated Biomass Growing Regions. (R. 9). The first region is the Franklin-Allegheny State Forest. This forest covers 756 acres, with 506 acres in Franklin and 256 acres in Vandalia. (R. 9). The three Franklin counties partially within the Franklin-Allegheny State Forest have unemployment rates of 9.7%, 12.3%, and 10.9%, respectively. (R. 9). The second region in the Central Appalachian Forest. This forest covers 422 acres and is entirely within Franklin. (R. 9). The two Franklin counties partially within the Central Appalachian Forest have unemployment rates of 14.6% and 9.8%, respectively. (R. 9). Of the 1,178 acres comprising the two Designated Biomass Growing Regions identified, 922 acres is within Franklin.

In addition to the new procurement obligations in EDEA §2(a), EDEA §2(b) imposes another procurement obligation. Under §2(b), electric distribution companies must procure 0.5% of their electricity sold to customers in Franklin from customer-sited CHP facilities connected to the distribution grid of a distribution utility serving Franklin customers, and fueled with biomass, by 2020. This procurement obligation increases to 1% by 2030. (R. 10). These CHP facilities can

be fueled by any biomass and are not limited to using certified biomass feedstock as defined in §2(a)(3). (R. 10). Because CHP facilities must be customer-sited and also connected to a distribution utility serving Franklin residents, all CHP facilities contemplated by §2(b) are located exclusively in Franklin. (R. 10).

SUMMARY OF THE ARGUMENT

The Supremacy Clause of the United States Constitution empowers federal law to preempt state law where both laws target the same domain or subject matter. Congress delegated to FERC exclusive and plenary authority over rates and regulations of interstate wholesale electricity markets under the Federal Power Act. Where Franklin's CAP program under §1 of the EDEA guarantees a different rate for capacity bids into an interstate wholesale market than FERC, Franklin's program must be preempted and federal law must reign supreme.

Franklin's impermissible intrusion upon federal jurisdiction is twofold. First, Franklin's state CAP program directly sets a higher price for interstate wholesale capacity. The fundamental basis of this program is a state subsidy to interstate generators in an interstate market. This is preempted by FERC's jurisdiction over rates and regulations affecting those interstate markets. Second, Franklin's program does not have a permissible incidental effect from regulating in its permissible domain. Instead, Franklin's law directly targets an interstate wholesale market, which lies outside any state's jurisdiction.

The dormant Commerce Clause prohibits state laws from discriminating against interstate commerce, either explicitly or in practical effect. When a state law reserves a portion of a given market for its own resources or business, and does so to the exclusion of interstate competition, that artificial isolation impermissibly discriminates against interstate commerce. EDEA §2(a)

explicitly and effectively reserves a portion of Franklin's electricity market for biomass primarily within Franklin. Similarly, EDEA §2(b), while facially neutral, effectively reserves a portion of Franklin's electricity market for combined heat and power generators located exclusively in Franklin. Furthermore, although state laws that burden interstate commerce may be valid in light of a legitimate local purpose, Franklin's purported purposes for both sections do not rise to the level of what have traditionally been considered legitimate local purposes. Absent a legitimate local purpose, both statutes are instances of simple economic protectionism and are *per se* invalid under the dormant commerce clause.

ARGUMENT

I. SECTION ONE OF THE ENERGY DIVERSIFICATION AND EXPANSION ACT AS ENACTED BY THE STATE OF FRANKLIN IS PREEMPTED UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause of the United States Constitution makes laws of the United States "the Supreme Law of the land . . . ." U.S. Const. art. VI, cl. 2. Put simply, federal law preempts contrary state law. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). Where, as here, a statute does not not refer expressly to pre-emption of the state law action, Congress may "implicitly" preempt state law "through 'field' preemption or 'conflict' preemption." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

Where Congress intended to foreclose state-level regulation in an area, regardless of whether the state law conflicts or harmonizes with the federal law, the Supreme Court recognizes the state is forbidden to regulate "in the field the federal statute preempts." *Oneok*, 135 S. Ct. at 1595 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (where Congress enacted

pervasive and encompassing immigration law and regulations, federal law thus occupied the entire field, and state law that was both complementary and without explicit federal counterpart in the field of immigration was pre-empted.))

Contrarily, conflict pre-emption requires state law to be preempted where compliance with both state and federal law is impossible, or where the state law so conflicts with the federal law that the purposes and objectives of the federal law is compromised. *Oneok*, 135 S. Ct. at 1595 (citing *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989); *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 377 (1988); *Geier v. Am. Honda Motor Co.*, 376 U.S. 861, 873 (2000).

Because Franklin's CAP program not only guarantees a price for wholesale electricity sold in the PJM different from what FERC has regulated, but also interferes with regulatory pricing mechanisms and policy implemented by FERC, this court should find Franklin's state-sponsored CAP program is both field and conflict preempted.

A. Franklin's CAP program under §1 of the EDEA program is a direct intrusion upon the field of regulating wholesale electric prices over which FERC has exclusive jurisdiction.

When Congress enacted the Federal Power Act (FPA), it gave FERC exclusive jurisdiction over the sale of interstate wholesale markets for electricity. 16 U.S.C. §824(b)(1). Congress intended this to be an explicit division of power between FERC and the states. *Hughes*, 136 S. Ct. at 1292. FERC was given jurisdiction limited to the interstate wholesale markets, but broadly applied to "[a]ll rates and charges made . . . by any public utility for or in connection with the transmission or sale of electric energy [in wholesale interstate markets] . . . and all rules and regulations affecting or pertaining to such rates or charges . . . ." FPA §824d(a). Reserved to the states were their traditional powers of regulating retail and other *in-state* sales, including the

regulation and control over *in-state* facilities. *Hughes*, 136 S. Ct. at 1292; *FERC v. Electric Power Supply Ass'n (EPSA)*, 136 S. Ct. 760, 767 (2016) (emphasis added).

It is clear then, that FERC operates within an exclusive zone of federal power. *See EPSA*, 136 S. Ct. at 767. The Supreme Court has repeatedly recognized the FPA permits no supplemental state law to regulate interstate wholesale markets for electricity. *Hughes*, 136 S. Ct. at 1297; *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956-57 (1986); *Miss. Power.*, 487 U.S. at 373. Because FERC's authority is deemed exclusive in regulating interstate wholesale electricity markets and their prices, FERC occupies the field regulating payments and rates of interstate wholesale electricity, and any state law relating to such field must then yield to federal law. *Hughes*, 136 S. Ct. at 1298-99; *Arizona*, 132 S. Ct. at 2502.

Franklin's CAP program impermissibly regulates within FERC's exclusive jurisdiction over rates and regulations interstate wholesale electricity markets. Thus, it is field preempted from guaranteeing a price for interstate wholesale electric capacity different than what FERC has set. FERC's charge of determining what interstate wholesale prices and mechanisms are "just and reasonable" means that its pricing and competitive bidding markets used in the PJM Interconnection are *per se* "just and reasonable." FPA §824d(a); *Hughes*, 136 S. Ct. at 1297. Yet, Franklin's CAP program is an effort to guarantee coal-fired electric producing facilities who bid into the PJM a fixed rate above FERC's regulated capacity price. Franklin has targeted only those generators who bid into the PJM. (R. 7). Selected facilities are guaranteed a CAP price determined, among other things, by comparing the costs of coal-fired plants to competing sources of electricity, an eligible facility's historic contribution sold to and consumed in Franklin, and relative bids into the PJM market made by coal-fired versus non-coal-fired facilities. (R. 7-8). While the rates may change numerically, the CAPs are contractually guaranteed for a ten-year period. (R. 7). Thus, an

eligible facility is guaranteed by Franklin's State Public Service Commission (PSC) some rate *in excess* of FERC's federally regulated interstate wholesale rate for capacity. (R. 6-9); EDEA §1(a)(2).

The Supreme Court struck down a functionally equivalent state law in *Hughes*. 136 S. Ct. at 1299. There, the state of Maryland was dissatisfied with FERC's operation of the PJM wholesale capacity market and its lack of incentive for new generators in Maryland. *Id.* at 1293. Maryland required distribution utilities purchasing electricity from the PJM to enter into a contract with a generator of electricity. *Id.* at 1294-95. The contract was for a twenty-year period and guaranteed the generator the price specified in their contract rather than the PJM auction clearing price. *Id.* If the price in the contract was higher than the FERC-regulated PJM auction price, the distribution utility paid the difference and recovered that difference through higher retail rates; if it was lower, the generator paid the difference and those savings were reflected in lower rates. *Id.* at 1295.

The Court held Maryland's program "adjust[ed] an interstate wholesale rate . . ." which "invad[ed] FERC's regulatory turf." *Hughes*, 136 S. Ct. at 1297. While it reinforced a state's right to regulate in their traditional authority over retail rates and in-state generation, the Court concluded that such State regulation may not interfere with FERC's authority by disregarding wholesale rates FERC has deemed just and reasonable through implementation of the PJM market system. *Id.* at 1298-99. Essentially, the contracted rate was a contract for differences, which mandated generators received a price different than the PJM price. *Id.* at 1299. While reaffirming the plenary reach of FERC's jurisdiction over interstate wholesale rates, the Court concluded the ruling does not bar States from encouraging production of in-state generation through measures "*untethered* to a generator's wholesale market participation." *Id.* (quoting Brief for Respondents,

40, *Hughes*, 136 S. Ct. 1288 (2012), (Nos. 14-614, 14-623)) (internal quotations omitted) (emphasis added).

Like in *Hughes*, Franklin was unsatisfied with how their coal-fired plants were faring in the PJM market, and faced the retirement of inefficient coal-fired plants in favor of other types of generators that would impair their coal industry. (R. 4). Still, however beneficial to the public interest, Franklin's PSC may not set a price above what FERC has already determined is just and reasonable, and the regulation must fall for the same reason in *Hughes*. Just as Maryland's contracts guaranteed a minimum price, Franklin's CAP contracts guarantee excess payments to coal-fired generation plants in three zones of the PJM. (R. 6, 7). While not a contract for differences of the kind in *Hughes*, both effectively guaranteed a price not determined by FERC for wholesale electricity from an interstate market.

Franklin asserts that they escape FERC's jurisdiction by narrowly regulating those generators who predominately serve Franklin, thereby acting within in the power to regulate intrastate activity reserved to the states under the FPA. *See* (R. 13); *Hughes*, 136 S. Ct. at 1292. These arguments of state's rights are similar to those made, and rejected, in *Hughes*. Most significantly, Franklin's CAP program fails to be untethered from FERC's PJM market. *Hughes*, 136 S. Ct. at 1299. Franklin's program attempts to target only those generators who serve Franklin and bid into the PJM. (R. 7). But the FPA does not allow FERC's jurisdiction to give way even where targeted generators bidding into the PJM predominately serve one state, as Franklin suggests. (R. 6, 13). Instead, the clear language of the FPA and Supreme Court precedent prevent Franklin from issuing regulations that directly affect or adjust rates in an interstate wholesale market. FPA §824d(a); *EPSA*, 136 S. Ct. at 774; *Hughes*, 136 S. Ct. 1298 ("States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable,

even when States exercise their traditional authority over retail rates or . . . in-state generation."). By guaranteeing higher prices per MWh for PJM wholesale electricity, they do just this. Also, the CAPs given to the generators operating in the three LMP zones of the PJM are not restricted from using those funds to support their bids purchased for or contracts made with other states. Therefore, the CAP program is necessarily a rate or charge for or in connection with interstate wholesale sales, which FERC has exclusive jurisdiction over. FPA §824d(a); *Hughes*, 136 S. Ct. at 1298-99.

Moreover, Franklin's argument that the law regulates within the power of the states under the FPA is unpersuasive at its core. It is undisputed that states may regulate in their congressionally assigned domain of power even if such regulation incidentally affects federal domain. *Hughes*, 136 S. Ct. at 1298 (citing *Oneok*, 135 S. Ct. at 1591). In finding preemption, however, it is important to consider the target at which the state law aims. *Oneok*, 135 S. Ct. at 1599-00. In *Oneok*, the Court upheld actions under state antitrust law invalidating anti-competitive rates, even though FERC regulated such rates under the Natural Gas Act. *Id.* at 1596. The Court found the state laws not preempted, as they were not aimed at natural-gas companies in particular, but to business in general. *Id.* at 1601. Unlike the law in *Oneok*, Franklin's CAP program aims specifically at electricity rates and generators in an interstate wholesale market, including states outside of Franklin. The CAP program targets any inter or intrastate generator who uses coal from Franklin in three geographic zones of the PJM. It requires the generator to bid into the federally regulated PJM market and relies on PJM auction prices to determine CAP prices. Lastly, Franklin even concludes in the EDEA's preamble that FERC's operation of the PJM fails to encourage new production. (R. 4). Thus, Franklin intended and even required §1 of the EDEA to aim at facilities participating in the federal PJM market and the rates and payments connected thereto.

In essence, Franklin enacted a program which doles out payments in excess of what federal wholesale markets pay. Franklin is undoubtedly vested with the power to regulate their in-state coal-fired generation plants. They may do this through tax incentives, land grants, or regulating other portions of the state's energy sector. *Hughes*, 136 S. Ct. at 1299; *see Allco Fin. Ltd. v. Klee*, 2014 WL 7004024, *7-10 (D. Conn. 2014) (A Connecticut regulation requiring state distribution utilities to enter into bilateral with generators who set the rate instead of requiring them to enter a FERC-regulated wholesale market avoided "market-distorting" features in *Hughes*.). What Franklin is not permitted to do, and what the EDEA commands, is to guarantee rates for electricity at the state level in excess of what FERC has deemed reasonable under the FPA for all eligible bids into the PJM market.

B. Franklin's CAP program under §1 of the EDEA directly conflicts with FERC's chosen federal policy and pricing mechanisms for interstate wholesale electricity markets.

Even if Franklin's increasing of the PJM auction capacity price is seen as not intruding on FERC's exclusive jurisdiction, Franklin's CAP program under the EDEA conflicts with FERC's competitive free market auction scheme.

Franklin chose to introduce competition in its electricity market under the Electric Customer Choice and Competition Act of 1996, which incorporated an interstate wholesale market regulated by FERC under the FPA. (R. 5); FPA §824(b)(1). As FERC's authority over these markets grew, FERC continued to regulate against anti-competitive practices, and determined that free-market mechanisms are a vital method to achieving this goal. *Morgan Stanley Capital Grp. Inc. v. Public Uti. Dist. No. 1*, 554 U.S. 527, 536 (2008); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-85 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010). As discussed previously, prices influenced through these free market principles are determined *per se* just and

reasonable by FERC. *Hughes*, 136 S. Ct. at 1297; *Morgan Stanley*, 554 U.S. at 545-55. Thus, while states may regulate within their reserved powers, "[a] state agency's efforts to regulate . . . must fall when they conflict with or interfere with federal authority over the same activity." *Oneok*, 135 S. Ct. at 1602 (citing *Miss. Power*, 487 U.S. at 377).

The EDEA CAP program conflicts with FERC's operation of the PJM market. Varying rates in the PJM signal to investors and generators the need for new development, infrastructure, and the surplus of capacity in certain regions. *Hughes*, 136 S. Ct. at 1293; *EPSA*, 136 S. Ct. at 774; (R. 6). These rate signals may be identified by comparing various localized LMP zones within the PJM, whose prices vary from natural market pressures. (R. 6). The EDEA's CAP program will distort these signals through two avenues: by encouraging non-competitive bids that lower the price of PJM wholesale sales and by discouraging the retirement of ineffective electricity producers. Because these avenues interfere with FERC's free market competitive system recognized in *Morgan Stanley* and other cases, they must fall. *Miss. Power*, 487 U.S. at 377 (a state regulation impermissibly challenging FERC-approved purchases conflicted and interfered with federal authority); *Arizona*, 132 S. Ct. at 2502.

FERC has already advocated that guaranteed additional prices for wholesale electricity outside of the rate paid by the PJM frustrate their chosen regulatory scheme. Brief for the United States as Amici Curiae Supporting Respondents at 25, No. 14-614 and 14-623, *Hughes*, 136 S. Ct. 1288 (2016); *New Jersey Bd. of Pub. Utils. v. FERC*, 774 F.3d 74, 92 (3d Cir. 2014) ("[S]ubsidized entry supported by one state's or locality's policies" may "disrupt[] the competitive price signals that [the auction] is designed to produce."). The Fourth Circuit recognized that Maryland's contracts in *Hughes* "seriously distort the PJM auction price signals" and undermine the signals for new generation. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014), *aff'd*,

136 U.S. 1288 (2016). These signals are no less distorted through the CAP program than in *Hughes*. In both situations, coal-fired generators who are mandated by state contracts to bid into the PJM market receive outside payments for their contribution to wholesale capacity. Once subsidized, they could bid at lower prices and drive down the capacity price in the neighboring LMP zones. *Hughes*, 136 S. Ct. at 1295 ("CPV is guaranteed a certain rate if its capacity does clear, so the contract's terms encourage CPV to bid its capacity into the auction at the lowest possible price."). An inefficient bid relying on only FERC's PJM price is unreasonable, because the bid would not cover operation costs or turn any profit for an unsubsidized generator. Yet, Franklin's CAP program encourages inefficient bids with the guarantee that money will come from elsewhere. It is likely that every generator receiving CAPs will have a sufficiently low artificial bid to make it into the PJM auction which unsubsidized generators may not match. Because these artificially subsidized bids are neither reasonably accurate to potential purchasers nor fair to other competitors, the free market price signals and FERC's policies are disrupted.

Additionally, Franklin's CAP program encourages inefficient generators to remain in the market. Variations in the LMP zone prices suggest where new infrastructure or generation facilities are needed. (R. 6); *EPSA*, 136 S. Ct. at 774. Investors looking to build new infrastructure in the three interstate LMP zones that Franklin targets will always see an artificially low price. More efficient or competitive generators seeking to enter those markets will be forced out by less efficient subsidized coal-generators. This anti-competitive structure does not support FERC's stated policies of a free-market system. *See Morgan Stanle*y, 554 U.S. at 536.

Franklin's CAP payments under the EDEA not only conflict with FERC-approved prices for wholesale electricity, but interfere with FERC's judgment that free-market competition is the best way to ensure just and reasonable electricity prices. For those reasons, the law is a clear

"obstacle to the accomplishment and execution of the full purposes and objectives" of FERC's free-market PJM auction. *Geier*, 376 U.S. at 873.

II. SECTIONS 2(a) AND 2(b) OF THE ENERGY DIVERSIFICATION AND EXPANSION ACT AS ENACTED BY THE STATE OF FRANKLIN ARE UNCONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the Constitution provides that Congress shall have the power "[t]o regulate Commerce. . . among the several States." U.S. Const. art. I, §8, cl. 3. Implicit in this positive grant of power is a "negative aspect," *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) (internal quotation marks omitted), also known as the dormant Commerce Clause, which "limits the power of the States to discriminate against interstate commerce." *Id*. The dormant Commerce Clause's purpose is to protect against economic isolation and Balkanization among the states, and prevent trade wars between the states. *City of Philadephia v. New Jersey*, 437 U.S. 617, 623 (1978); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) ("the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."). In enforcing the dormant Commerce Clause, the Supreme Court has employed two tests for determining whether a state statute unconstitutionally discriminates against interstate commerce.

The first test is under a strict scrutiny standard. Where a state statute discriminates against interstate commerce "'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (quoting *Hughes v. Oklahoma (Oklahoma)*, 441 U.S. 322, 336 (1979)). Essentially, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *City of Philadelphia*, 437 U.S. at 624.

The second test is less demanding than the strict scrutiny standard. Where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A state statute that amounts to something other than economic protectionism, but still burdens interstate commerce, is subject to this second test.

EDEA §2(a) and §2(b) are both discriminate against interstate commerce. Additionally, Franklin's purported purposes for both sections do not justify this discrimination. Furthermore, even assuming that each section has a legitimate purpose, Franklin has not carried its burden in demonstrating that the those purposes could not have been carried out through nondiscriminatory means. Because EDEA §2(a) and §2(b) are discriminatory and because Franklin has provided no justification for that discrimination, both sections unconstitutionally discriminate against interstate commerce.

A. EDEA §2(a) facially and effectively discriminates against interstate commerce, and Franklin has failed to justify §2(a)'s impermissible discrimination.

EDEA §2(a) facially and effectively discriminates against interstate commerce, and the section's stated purpose of conservation does not justify its protectionist effect. The practical effect of §2(a) is to force electricity distributors to participate in a market, a Franklin-centric market, a market they might not otherwise choose, thereby undermining the flow of interstate commerce. It is necessary to briefly explain the process of the new RPS to outline its protectionist impact.

The changes to Franklin's RPS now require electricity distributors to procure a given percentage of their electricity from specific generating plants that co-fire their coal with at least 15% "Certified Biomass Feedstock." EDEA §2(a)(3). Certified Biomass Feedstock must in turn be sourced from a Designated Biomass Growing Region, as defined under EDEA §2(a)(4). It is

the geographic and qualitative limitations used to identify the Growing Regions that are problematic. These limitations have produced a protectionist effect: Franklin biomass is the overwhelming majority of chosen Certified Biomass Feedstock. About 78% of both Growing Regions are located in Franklin, one of which is located entirely within Franklin. (R. 9). Because the new RPS mandates that a percentage of electricity is procured from generating plants using this Franklin-sourced biomass, distributors are precluded from procuring electricity from generating plants co-fired with biomass from other interstate markets. This inhibition of the flow of interstate commerce is the product of the way EDEA §2(a)(4) identifies Designated Biomass Growing Regions.

i. <u>The geographic limitation of Designated Biomass Growing Regions to areas "within the state of Franklin and the adjoining states thereto" facially discriminates against interstate commerce.</u>

EDEA §2(a)(4) commits a common error found in many other unconstitutional state statutes: it facially discriminates against interstate commerce. *See City of Philadephia*, 437 U.S. 617 (finding state statute unconstitutional because it facially discriminated against interstate commerce); *Oklahoma*, 441 U.S. 322 (same); *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (same); *New Energy*, 486 U.S. 269 (same); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (same).

Designated Biomass Growing Regions are strictly and expressly limited to areas "within the state of Franklin and the adjoining states thereto . . . ." EDEA §2(a)(4). Certified Biomass Feedstock is sourced from these limited Growing Regions. EDEA §2(a)(3). Electricity distributors must procure a portion of their electricity from generators co-fired with this Franklin-centric biomass. (R. 8). In essence, this Franklin-centric biomass is given its own exclusive market, artificially outside of the influence of interstate commerce.

Shielding a market from the influence of interstate commerce does not comport with the essential purpose behind the dormant Commerce Clause: to prevent states from imposing economically protectionist measures that would trigger other states to do the same, thereby fracturing the Union the new United States was premised on. *See Baldwin*, 294 U.S. at 522; *See also Oklahoma*, 441 U.S. at 325.

Furthermore, Franklin's assertion that this geographic limitation is tied to neutral environmental factors, rather than state borders, (R. 14), is untenable and disingenuous. The limiting language in §2(a)(4) is explicit and entirely separate from the other limiting environmental factors in §2(a)(4)(i). The geographic limitation is plainly a threshold limitation; biomass must first be in Franklin or its adjoining states and then must also satisfy the environmental and economic requirements in §2(a)(4) subsections (i) and (ii). *See* EDEA §2(a)(4). To hold that the geographic limitation is solely tied to environmental factors, as Franklin contends, would be to write out the limiting phrase completely and undermine its plain meaning, an impermissible interpretation.

The geographic limitation is plainly drawn along state borders, a limitation that stops the flow of commerce from extending throughout the entire country. Such a stranglehold on the free flow of interstate commerce was exactly what the Framers of the Constitution sought to abolish in drafting the Constitution: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 9 Wheat. 1, 231 (1824) (Johnson, J., concurring). Absent the limitation, electricity distributors might procure electricity from generators co-fired with biomass from any number of areas. EDEA §2(a)(4) forecloses this possibility. It explicitly mandates that certain biomass have a share of the market, thereby eliminating the influence of

interstate commerce. Facial discrimination of this sort is impermissible under the dormant Commerce Clause and triggers the strictest scrutiny. *Oklahoma*, 441 U.S. at 336 (1979).

ii. The practical effect of the geographic limitation in EDEA §2(a)(4) and the operation of §2(a) effectively reserves a share of Franklin's electricity market for biomass that is wholly or mostly within Franklin's borders.

The practical effect of the explicit geographical limitation is discrimination against interstate commerce, which triggers the strictest scrutiny. *See Oklahoma*, 441 U.S. at 336. Not only is a Growing Region expressly limited to Franklin and its adjoining states, but the operation of §2(a)(4) further limits Growing Regions to those areas that are wholly or mostly in Franklin's borders. This further limitation is effective discrimination of the most protectionist sort.

Even standing alone, the geographic limitation in §2(a)(4) effectively discriminates against interstate commerce. This effective discrimination is exactly the same as that condemned in *Wyoming v. Oklahoma*, 502 U.S. 437. *Wyoming* involved an Oklahoma statute that explicitly mandated coal-fired generators supplying electricity to Oklahoma customers to burn coal that was co-fired with at least 10% Oklahoma-mined coal. *Wyoming*, 502 U.S. at 440. The Supreme Court held that the Oklahoma statute effectively "reserv[ed] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States [and that such] a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory . . . ." *Id.* at 455. Similarly here, the geographic limitation in §2(a)(4) works to reserve a segment of the Franklin electricity market for Franklin-centric biomass. Distributors must procure a portion of their electricity from generators co-fired with at least 15% Certified Biomass Feedstock. (R. 8). Certified Biomass Feedstock must be sourced from a Designated Biomass Growing Region, which will ultimately be sourced from either Franklin or Franklin's adjoining states. (R. 8-9). The upshot is that the electricity procured by the distributors under §2(a) must

encompass Franklin-centric biomass. This is confirmed by the fact that both Growing Regions are within the geographic limitation. (R. 9). Biomass outside of §2(a)(4)'s geographic limitation, even biomass of similar environmental quality as that mandated by §2(a)(4)(i), is completely excluded from the Franklin electricity market for that portion of electricity that distributors are required to procure under §2(a). It is precisely this type of scheme that *Wyoming* condemned as effectively discriminatory. *See Wyoming*, 502 U.S. 437.

Moreover, the practical operation of §2(a)(4) is even more restrictive than the express geographic limitation. Although the geographic limitation makes it possible for a Growing Region to theoretically be entirely within one of Franklin's adjoining states, the operation of §2(a)(4) limits Growing Regions to those wholly or mostly within Franklin. This is evidenced by the fact that out of 1,178 acres covered by both Growing Regions, 928 acres is exclusively within the state of Franklin. (R. 9). Again, effectively reserving a segment of a market to the exclusion of interstate competitors is impermissible. *Wyoming*, 502 U.S. at 445.

Additionally, Franklin's argument that §2(a) is simply regulation of generation facilities and retail sales, (R. 14), is unavailing. It is true that regulation of retailers is permissible and does not violate the dormant Commerce Clause. *Exxon, Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978) ("the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."). *Exxon* involved a Maryland statute that prohibited petroleum producers and refiners from operating gas stations in Maryland and mandated uniform distribution of gas to stations that those petroleum producers supplied. *Id.* at 119-20. The Supreme Court upheld these regulations because they only burdened individual oil companies, without manipulating interstate markets. *Id*. at 125-29. Central to this holding was the fact that markets were untouched by the regulation and that no market-favoritism was at work: "[p]lainly, the

Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners." *Id*. at 125. Franklin may regulate individual firms with impunity under the dormant Commerce Clause. Indeed, the existing RPS already required electricity distributors to procure a certain percentage of electricity from renewable sources. (R. 8). But, the moment Franklin reserved a segment of its electricity market for Franklin biomass, it discriminated against interstate commerce. *See Wyoming*, 502 U.S. at 445. Such market regulation is still foreclosed by the dormant Commerce Clause. *Exxon*, 437 U.S. at 127-28.

Ultimately, a portion of Franklin's electricity market will be reserved for mostly Franklin-sourced biomass, to the exclusion of biomass markets outside of Franklin. This practical effect is bare discrimination against interstate commerce – an impermissible effect under the dormant Commerce Clause – and one that triggers the strictest scrutiny. *Oklahoma*, 441 U.S. at 336.

iii. <u>Franklin's purported purpose of encouraging environmentally beneficial actions does not justify EDEA §2(a)'s protectionist effect and, regardless, Franklin has not met its burden of proving that no available nondiscriminatory means could have achieved the same purported purpose.</u>

Because EDEA §2(a) is both facially discriminatory and effectively discriminatory, the burden shifts to Franklin to justify this discrimination by demonstrating that §2(a) "'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine*, 477 U.S. at 138 (quoting *Oklahoma*, 441 U.S. at 336). Firstly, the purported purpose for EDEA §2(a), to "encourage environmentally beneficial actions," (R. 14), is simply a cover for §2(a)'s true protectionist purpose. Secondly, even assuming that the purported purpose is legitimate, Franklin has not demonstrated that there are no available nondiscriminatory means that could achieve that purpose. *See Maine*, 477 U.S. at 138 (1986).

Franklin paints §2(a) as encouraging environmentally beneficial actions, but the language in the statute itself and its practical effect evinces a purely protectionist purpose. The fact that

eligible biomass is limited to areas within Franklin and its adjoining states and is further limited to those areas that are "economically depressed," EDEA §2(a)(4), undermines the notion that §2(a) is aimed to foster more use of biomass. Using economic conditions as factors in determining the eligibility of biomass suggests that the statute is aimed at revitalizing Franklin's economy, rather than environmental conservation. This suspicion is bolstered by the fact that *only* Franklin unemployment rates were recited in the identification of the two Growing Regions. (R. 9). Moreover, the geographic limitation of §2(a)(4) supports the reality that §2(a)'s true purpose is to foster a biomass industry in Franklin. Such a purpose is not within the residuum of authority that states have over matters in "the health and safety of its citizens and the integrity of its natural resources." *Maine*, 477 U.S. at 151.

Regardless of §2(a)'s true purpose, its practical effect is to cut off interstate biomass from Franklin's electricity market in favor of Franklin-sourced biomass. Even legitimate goals cannot be achieved "by the illegitimate means of isolating the State from the national economy." *City of Philadelphia*, 437 U.S. at 627. Furthermore, Franklin has made no assertion whatsoever that §2(a)'s purported purpose could not have been satisfied by available nondiscriminatory means. *See Maine*, 477 U.S. at 138. Notably, Franklin could have simply required distributors to procure electricity from generators co-fired with *any* renewable resource. Such a regulation has been upheld in at least one court, *see Energy and Environment Legal Institute v. Epel*, 43 F. Supp. 3d 1171 (D. Colorado 2014), and would satisfy Franklin's purported goal.

Because §2(a) is both facially and effectively discriminatory and because Franklin has failed to meet its burden of justifying such blatant discrimination, §2(a) amounts to "simple economic protectionism" and is "*per se* invalid." *City of Philadelphia*, 437 U.S. at 624. In short, §2(a) is in clear violation of the dormant commerce clause and is unconstitutional.

B. EDEA §2(b) effectively discriminates against interstate commerce and Franklin has failed to justify §2(b)'s impermissible discrimination.

EDEA §2(b) effectively discriminates against interstate commerce, and the section's purported purpose of capturing the benefits of customer-sited generators does not justify its protectionist effect. The practical effect of §2(b), like that of §2(a), is to force electricity distributors to participate in a market exclusively in Franklin, a market they might not otherwise choose, thereby undermining the flow of interstate commerce.

i. Because CHP generators are inherently within Franklin, the practical effect of EDEA §2(b) is to reserve a portion of Franklin's electricity market for Franklin generators, to the exclusion of generators outside of Franklin.

The operation of EDEA §2(b) inherently mandates distributors to procure a portion of electricity exclusively from Franklin generators. Admittedly, there is no facial discrimination in §2(b), but effective discrimination alone is impermissible and enough to trigger strict scrutiny. *Oklahoma*, 441 U.S. at 336.

In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), a Louisiana statute prohibited salt-water shrimp from being exported from Louisiana, unless the "heads and hulls" of the shrimp had been removed. *Id*. at 8. At the time, explicitly keeping a state's game and fish within that state's borders was permissible under the dormant Commerce Clause. *See Geer v. State of Connecticut*, 161 U.S. 519 (1896) (overruled by *Hughes v. Oklahoma*, 441 U.S. 322). The operation of the Louisiana statute was that shrimp caught in Louisiana had to be processed and packed in Louisiana. *Foster-Fountain Packing Co.*, 278 U.S. at 13. The practical effect of the statute was to favor Louisiana's canning industry, to the exclusion of canneries outside of Louisiana. *Id*. Similarly here, EDEA §2(b) works to favor Franklin generators to the exclusion of electricity generators outside of Franklin. EDEA §2(b) requires electricity distributors providing electricity to Franklin residents to procure a portion of their electricity from customer-sited

combined heat and power (CHP) generators fueled with biomass. (R. 10). There is no requirement that the biomass be Certified Biomass Feedstock. *Id*. However, because these CHP generators are customer-sited, they will necessarily be within Franklin. *Id*. Just as Louisiana in *Foster-Fountain Packing Co*. isolated its canneries from interstate competition, Franklin has isolated Franklin CHP generators from interstate competition. And just as facial neutrality did not save Louisiana statute, facial neutrality does not save §2(b).

Because EDEA §2(b) effectively discriminates against interstate commerce, §2(b) is not entitled to the less exacting dormant Commerce Clause test expressed in *Pike*, 397 U.S. at 142. When a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id*. But, the Court in *Pike* clarified its test with regards to the burden on interstate commerce: "[t]he nature of that burden is, constitutionally, more significant than its extent. For the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Id*. at 145. Though §2(b) regulates even-handedly on its face, its burden on interstate commerce is total. EDEA §2(b) reserves a segment of Franklin's electricity market for Franklin generators, to the exclusion of electricity generated outside of Franklin. The nature of this burden is absolute: it is effective discrimination well beyond an incidental burden. Therefore, the *Pike* test is inapplicable.

The practical effect of §2(b) is to shield Franklin generators from interstate competition. Such discrimination against interstate commerce has already been constitutionally foreclosed. *See Wyoming*, 502 U.S. at 445.

ii. Franklin's purported purpose of capturing the benefits of customer-sited generators does not justify EDEA §2(b)'s protectionist effect and, regardless, Franklin has not met

its burden of proving that no available nondiscriminatory means could have achieved the same purported purpose.

Because EDEA §2(b) is effectively discriminatory, the burden shifts to Franklin to justify this discrimination by demonstrating that §2(b) "'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine*, 477 U.S. at 138 (quoting *Oklahoma*, 441 U.S. at 336). Firstly, the purported purpose of EDEA §2(b), to "capture the unique benefits of customer-sited generation," (R. 14), cannot justify §2(b)'s effective discrimination. Secondly, even assuming that the purported purpose is legitimate, Franklin has not demonstrated that there are no available nondiscriminatory means that could achieve that purpose. *See Maine*, 477 U.S. at 138.

States have the power "to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949). However, the "benefits of customer-sited generation," (R. 14), are not within the ambit of these permissible powers. Franklin contends that CHP generators will improve the resilience of its electricity grid. (R. 14). Such a goal is, at most, tangentially related to health and safety in the most attenuated way. Proper justification is generally tied to more serious concerns, like those in "quarantine laws." *See Asbell v. State of Kansas*, 209 U.S. 251 (1908) (upholding state statute conditioning the importation of out of-state cattle on the satisfaction of a cattle inspection, where the clear purpose of the law was to prevent the influx of diseased cattle). To equate §2(b)'s purported purpose with the dire concerns inherent in quarantine and other health and safety laws would be "to eat up the [dormant Commerce Clause] under the guise of an exception." *Baldwin*, 294 U.S. at 523.

Furthermore, even serious concerns cannot be remedied through protectionist state statutes. The protectionist effect is still impermissible. *City of Philadelphia*, 437 U.S. at 627; *Asbell*, 209

U.S. at 256. Finally, Franklin has made no assertion whatsoever that the purported purpose could not have been satisfied by available nondiscriminatory means. *See Maine*, 477 U.S. at 138.

Because §2(a) is effectively discriminatory and because Franklin has failed to meet its burden of justifying that discrimination, §2(b) amounts to "simple economic protectionism" and is "*per se* invalid." *City of Philadelphia*, 437 U.S. at 624. As such, EDEA §2(a) violates dormant commerce clause and is unconstitutional.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment below and hold §1 of the EDEA preempted under the Supremacy Clause of the United States Constitution and §2 of the EDEA unconstitutional under the dormant Commerce Clause.

<u>Certificate of Service</u>

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

Respectfully submitted,

Team No. 11