C.A. No. 16-01234

In The

United States Court of Appeals for the Twelfth Circuit

STATE OF FRANKLIN

Appellant,

v.

ELECTRICITY PRODUCERS COALITION

Appellee.

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

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Eastern District of Franklin. Jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1291. Because the claims arise under federal law, federal courts maintain jurisdiction over the subject matter pursuant to 28 U.S.C. §1331. The United States District Court for the Eastern District of Franklin granted Appellee's motion for summary judgment on November 7, 2016, awarding Appellee declaratory and injunctive relief. Appellant subsequently timely filed its notice of appeal from the District Court's judgment with the Twelfth Circuit Court of Appeals on December 6, 2016.

STATEMENT OF THE ISSUES PRESENTED

1. The Supremacy Clause of the U.S. Constitution establishes the Constitution and laws of the United States as supreme law of the land, allowing federal law to preempt state law where conflicts arise between the two. The District Court found Franklin's Energy Diversification and Expansion Act to be field and conflict preempted by the Federal Energy Regulatory Commission's exclusive authority pursuant to the Federal Power Act over the sale of electric energy at wholesale in interstate commerce. Is the EDEA field and conflict preempted by FERC's authority?
2. The Commerce Clause of the U.S. Constitution confers on Congress the power to regulate commerce among the states. The Dormant Commerce Clause doctrine prohibits a state from discriminating against or unduly burdening interstate commerce. The District Court found that Franklin's Energy Diversification and Expansion Act's geographic limitations discriminated against interstate commerce. Is the EDEA in violation of the Dormant Commerce Clause?

STATEMENT OF THE CASE

In January 2016, the State of Franklin enacted the Energy Diversification and Expansion Act (EDEA), in order to preserve economic viability of coal-fired generating plants currently in existence and to attempt to better develop a biomass industry within the state. The enactment of the EDEA accounted for an anticipated loss of generation capacity within Franklin's region, which threatened the reliability of the electric generating system and threatened a potential loss of jobs for Franklin's citizens within the industrial and manufacturing sectors of the state. The Electricity Producers Coalition (EPC), a national trade association designated as a representative for leading competitive electric power suppliers, brought this action in the Federal District Court for the Eastern District of Franklin on July 1, 2016, after Franklin's Public Service Commission (PSC) issued the EDEA Implementation Order and the Biomass Eligibility Determination. The EPC sought a declaratory ruling, arguing that implementation of the proposed Carbon Assistance Payment (CAP) program would be a violation of the United States Constitution's Supremacy Clause, as the Federal Energy Regulatory Commission (FERC) maintains exclusive authority over the sale of electric energy at wholesale in interstate commerce. The EPC further argued that modifications to Franklin's Renewable Portfolio Standard (RPS) were in violation of the Constitution's Dormant Commerce Clause because they created a discriminatory impact on interstate commerce. Because the projected implementation date of the EDEA was September 1, 2016, the EPC also sought injunctive relief to prevent the state of Franklin from implementing the EDEA until resolution of these legal issues was achieved.

The EPC and the State of Franklin filed cross-motions for summary judgment after this action was commenced in the District Court. The District Court ultimately granted EPC's motion for summary judgment on November 7, 2016, finding that Section 1 of the EDEA was both field and conflict preempted under the Supremacy Clause of the Constitution because of FERC's

exclusive authority in this area. The Court determined that Section 1 of the Act was field preempted because of FERC's exclusive jurisdiction under the Federal Power Act (FPA) regarding the sale of electric energy and the sale of capacity at wholesale within interstate commerce. The Court seemed to think that the CAP program would interfere with wholesale power markets, especially in capacity prices set by the PJM Interconnection (PJM), as the coal-fired plants entitled to receive CAPs would receive a considerable out-of-market payment, setting a greater above-market price for electricity sold by subsidized generators. Concerning conflict preemption, the Court reasoned that since FERC has determined that market-based processes approved and overseen by the agency are the best way to bring about more efficient, inexpensive power to U.S. electricity customers, the CAP scheme would interfere with these markets' signals intended for provision by the competitive auction market process for capacity conducted by PJM. The Court reasoned that this scheme could potentially result in the discouragement of the financing and creation of new economic generation by potential investors.

Regarding the unconstitutionality of the Dormant Commerce Clause, the Court found that Sections 2(a) and 2(b) of the EDEA were invalid under the Dormant Commerce Clause because of geographic limitations. Section 2(a) was rendered invalid due to the geographic limitation of "certified biomass feedstock," limited under the EDEA to areas primarily within the state of Franklin. The Court found that the geographic limitation imposed in "certifying" the biomass feedstock "impermissibly discriminate[d] against biomass produced outside of the state of Franklin, and thus burdens interstate commerce." Likewise, the Court found Section 2(b) invalid due to the geographic limitation of "eligible facilities" to customer-sited generation connections to the electric distribution utilities grid serving retail customers within Franklin. The Court found that "the design of Section 2(b) by its very nature exclude[d] the participation of energy

providers outside of [] Franklin, and the state has articulated no basis to justify this burden on interstate commerce." R. at 13. Because the State of Franklin denies that it's CAP program is preempted by the FPA and that it's RPS provision runs afoul of the Dormant Commerce Clause, the State of Franklin now appeals the District Court's grant of the EPC's motion for summary judgment.

STATEMENT OF THE FACTS

The state of Franklin, the third largest coal producing and forested state in the U.S., is located in a region served by the PJM Interconnection (PJM). R. at 3, 5. This operating region is divided into 21 locational marginal pricing (LMP) zones that reflect the relative generation capacity—supply—load—demand—within a geographic area, considering transmission constraints. R. at 5–6. These LMP zones use market-based pricing, which in turn reflects the impact of energy's inability to move through the entire PJM territory because of transmission deficiency concerns, such as congestion. R. at 5. Franklin had previously restructured its electricity markets in response to the Electric Customer Choice and Competition Act of 1996, which allowed distribution utilities who sell electricity to ratepayers to purchase electricity from independent power producers. R. at 5. Distribution utilities now purchase electricity through either (1) bilateral contracts, or (2) competitive wholesale markets administered by Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs). RTOs and ISOs are independent entities created and regulated by FERC. R. at 5. Marginal cost of energy varies by region because each utility bids in at different prices to produce electricity. That is, bidding utilities have different: (1) costs of production and (2) invested capital. Hence, electricity's price variance is inherent because each LMP zone purchases to reach its own estimated capacity.[1]

[1] Low-energy cost cannot reach all demand because of inadequate transmission. R. at 6.

R. at 6. Three LMP zones are located within the state of Franklin: Franklin East, Vandalia South, and Allegheny North. R. at 6.

The State of Franklin enacted the EDEA in January of 2016 to preserve the economic viability of the existing coal-fired generating plants and to stimulate a developing biomass industry in the state. R. at 3. In preceding years, Franklin suffered dramatic declines in coal production due to the availability of cheaper natural gas and declining prices of renewable resources—namely wind and utility-scale solar photovoltaic (PV). R. at 3. Electric utilities diversified and integrated these cheaper resources into generating portfolios. R. at. 3. For these reasons, as well as strict regulations promulgated by the Environmental Protection Agency (EPA), many of Franklin's coal plants were in financial distress. R. at 3. These coal plants' contribution to the state's economy was specifically determined to be at risk.[2] R. at 3. Likewise, Franklin anticipated a loss in generating capacity and, consequently, a decrease in the grids' reliability—potentially hampering Franklin's ability to both attract and retain industrial and manufacturing jobs. R. at 3.

Upon enacting the EDEA, Franklin's governor, Emmanuel Carbon, issued a statement which promulgated many of the EDEA's economic benefits. R. at 5. These benefits included support for the coal miners of Franklin—considered the state's most important industry; opportunity for diversification of Franklin's energy economy by exploring the state's biomass resource potential; and, the creation of new jobs in the future energy industry via a growth stimulation to distributed generation resources. R. at 5. The EDEA reflected these goals by specifically providing for: (1) CAPs, which are financial incentives, eligible to coal-fired

[2] These contributions included: (1) continued production of coal within Franklin to meet fuel supply needs; (2) preservation of the coal severance tax revenue to the state budget; (3) continued employment of coal miners in the state; and, property tax revenues going to communities that maintained these plants. R. at 1.

generating plants serving the state; (2) a modification to Franklin's existing Renewable Portfolio Standard (RPS) mandating distribution companies to obtain a portion of its electricity supply from co-fired utilities that generate electricity from at least a fifteen percent certified biomass feedstock fuel supply; and, (3) a modification to Franklin's existing RPS carving-out a customer-sited combined heating and power (CHP) or facilities fueled with biomass. R. at 4.

Franklin's PSC was primarily responsible for administration of the CAP program. R. at 6. The EDEA required the PSC to identify eligible coal-fired generating plants to receive CAPs and to set payment levels. R. at 6. Such CAPs were to be determined by the PSC, and upon the PSC's determination of CAP eligibility, plant owners were to be offered a ten-year contract to receive CAPs by the Franklin State Energy Office (SEO). R. at 6–7. The EDEA mandates that defined eligible units, i.e., utilities, can receive CAPs R. at 7. The PSC has limited the number of CAPs sold annually to a megawatt hour (MWh) amount by verifying each unit's past contribution to in-state energy consumption over time. R. at 7. The SEO would subsequently collect revenues necessary to fund CAPs by assessing the five electric distribution utilities in operation within Franklin; the PSC in turn, would set rates for each utility to recover costs of CAP assessment in retail rates. R. at 7.

Upon the passage of the EDEA, the PSC attempted to implement the Act in February of 2016 during a proceeding to make necessary determinations according to the statutory guidance provided by the EDEA. R. at 7. Following this proceeding, Franklin's Department of Natural Resources and Division of Commerce (NRDC) issued its Biomass Eligibility Determination Order in June of 2016, which identified two Designated Biomass Growing Regions: Franklin-Allegheny State Forest and the Central Appalachian Forest. R. at 9. Franklin enacted its RPS in 2007, requiring Franklin's five operating electric distribution companies to secure twenty percent

of its electricity sold to retail customers in Franklin from renewable resources by the year 2020, increasing to thirty percent by the year 2030. R. at 8.

The EDEA tasked the PSC with making the necessary findings to justify and implement the changes because the PSC has primary authority over already existing RPS administration R. at 8. Section 2(a) of the EDEA modifies the existing RPS to include imposition on electric distribution utilities to procure a specific percentage of their electricity supply for Franklin's retail customers from generating plants. R. at 8. These are fueled by a supply comprised of coal and no less than fifteen percent certified biomass feedstock, specifically setting the procurement obligation for electricity generated at co-fired plants to begin at three percent beginning in the year 2020 and reaching five percent by the year 2030. R. at 8. Section 2(b) of the EDEA also modifies Franklin's existing RPS to include a carve-out for customer-sited cogeneration facilities, fueled by biomass, connected to the distribution grid of a utility serving citizens within Franklin. R. at 10.

Members of the EPC, the national trade association designated as representative of leading competitive electric power suppliers, include several companies involved in competitive wholesale and retail electricity markets that own long-term capital in generation utilities and market within Franklin and the greater PJM operating region. R. at 12. Hence, EPC has historically been able to bid in at lower wholesale prices, thereby solidifying its substantial profit margin against marginal pricing. R. at 5, 12. The EPC brought the action at issue in the Federal District Court for the Eastern District of Franklin on July 1, 2016, after Franklin's PSC issued the EDEA Implementation Order and the Biomass Eligibility Determination. R. at 12. The EPC sought a declaratory ruling, arguing that the CAP program was a violation of the U.S. Constitution's Supremacy Clause as FERC maintains exclusive authority over the sale of electric

energy at wholesale in interstate commerce. R. at 12. The EPC also argued that modifications to Franklin's RPS were in violation of the Constitution's Dormant Commerce Clause because they created a discriminatory impact on interstate commerce. R. at 12. Because the projected implementation date of the EDEA was September 1, 2016, the EPC also sought injunctive relief to prevent the EDEA's implementation until resolution of the legal issues presented to the court. R. at 12.

The EPC and the State of Franklin filed cross-motions for summary judgment after the action commenced in District Court. R. at 12. The District Court ultimately granted the EPC's motion for summary judgment on November 7, 2016, finding that Section 1 of the EDEA was both field and conflict preempted under the Supremacy Clause of the Constitution because of FERC's exclusive authority over this area, and that Sections 2(a) and 2(b) of the EDEA were invalid under the Dormant Commerce Clause because of geographic limitations that had a disparate impact on interstate commerce. R. at 12–13. The State of Franklin now appeals this judgment. R. at 13.

SUMMARY OF THE ARGUMENT

Article VI, clause 2 of the United States Constitution provides that the Constitution and laws of the United States Federal Government are the supreme law of the land. The Supremacy Clause mandates that federal law supersede any state law when conflicts arise between the two. Two types of preemption have been recognized by the Supreme Court. Field preemption exists where Congress has expressly preempted state law with clear statutory language, and has legislated an area of industry so comprehensively that it leaves the states no room to supplement it. Field preemption may also arise implicitly when a federal law "occupies the field," or the federal interest is so dominant that the federal system is assumed to preclude enforcement of

state law on the same subject. Conflict preemption occurs when a state law directly interferes with federal law, or when a state law otherwise stands as an obstacle to the accomplishment and execution of Congress' objectives.

In the same vein, Article I, § 8, clause 3 of the United States Constitution provides that Congress maintains the power to regulate commerce among the states. From this congressional power, courts have inferred a restriction which inhibits a state from passing legislation that improperly discriminates against interstate commerce. Courts will typically strike down a state's law if it expressly mandates differential treatment of competing in-state and out-of-state economic interests or if it benefits the former and burdens the latter. Such laws are facially discriminatory and subject to review under strict scrutiny, requiring a non-protectionist purpose and no less discriminatory means for achieving that purpose.

In this case, the State of Franklin's EDEA is neither field nor conflict preempted by the Supremacy Clause of the Constitution. The EDEA is not field preempted because it was not Congress's intent for the FPA to entirely flood the field of electricity regulation. Rather, Congress explicitly left room for the states to supplement existing federal law in this area. Likewise, the federal interest is not so dominant in this field that the federal system can be assumed to preclude the enforcement of Franklin's EDEA. The states have a long, recognized right to regulate the components of the electric grid within their own state. Similarly, the EDEA is not conflict preempted because the CAP program is not a barrier to any of FERC's objectives. While FERC has exclusive jurisdiction to oversee interstate wholesale rates, Franklin may still regulate intrastate retail rates to achieve the State's own objectives through the EDEA.

Likewise, the EDEA does not violate the Dormant Commerce Clause. Franklin's legitimate goal of utilizing the State's natural resources to ensure energy reliability is within its

traditional governmental function and within it's police powers to provide for substantial environmental benefits and to utilize its substantial biomass resource potential. Neither does the EDEA overtly or covertly discriminate against interstate commerce. Franklin is within its right to favor its own citizens over the citizens of other states. Likewise, there are no less discriminatory means available to achieve Franklin's purpose. Since the EDEA is not overtly discriminatory against out-of-state producers, there is a presumption in favor of upholding the law, and the EDEA will be invalidated only if it is shown that the it's burdens on interstate commerce are clearly excessive to its benefits. Because no such showing has been made, the EDEA is not in violation of the Dormant Commerce Clause. For these reasons, the District Court improperly granted the EPC's motion for summary judgment. This Court should remand for trial on the merits.

ARGUMENT

I. Franklin's Energy Diversification and Expansion Act is not preempted by the Federal Energy Regulatory Commission, which has exclusive authority over the sale of electric energy, because the Federal Power Act has expressly authorized state regulation in this area.

The Federal Power Act (FPA), enacted by Congress in 1935, grants the Federal Energy Regulatory Commission (FERC) exclusive authority to regulate the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b); *see also F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016). FERC did not always maintain oversight of the sale of electric energy; instead, federal regulation of electricity owes its origins to an early 20th century United States Supreme Court case. *See Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). At the time this case was decided, state and local agencies had essentially limitless regulatory authority over all aspects of electricity generation, transmission, and distribution. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 767. In rendering their decision in

Attleboro, the Supreme Court found that the Commerce Clause of the United States Constitution prevents the states from engaging in regulation of a number of interstate electricity transactions, including wholesale sales across state lines. *See id.*; *see also Attleboro*, 273 U.S. at 89–90. In *Attleboro,* "the conflict arose . . . where the Rhode Island Public Utilities Commission [] attempted to set one rate for electricity sold in Rhode Island and another, higher rate for electricity sold in Massachusetts." LINCOLN L. DAVIES, ET AL., ENERGY LAW AND POLICY 358 (1st ed. Westlaw Academic Publishing 2015). The Supreme Court ruled against Rhode Island's regulation, because the regulation "impermissibly burden[ed] interstate commerce." *Id.* The creation of what is deemed the "*Attleboro* gap" essentially left a void in the regulation of interstate wholesale electric states which only Congress could fill. *See Attleboro*, 273 U.S. at 90. Congress in turn filled this void by passing the Federal Power Act in 1935, authorizing FERC's predecessor, and FERC in turn, the authority to regulate the transmission and the sale of electric energy at wholesale in interstate commerce. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 767; 16 U.S.C. § 824(b).

The FPA charges FERC to regulate the sale of wholesale electricity in interstate commerce. *See* 16 U.S.C. § 791a et seq.; *see generally* Joseph T. Kelliher, *Market, Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L. J. 1 (2005). The FPA further obligates FERC to oversee that those interstate rates are just and reasonable. *See* 16 U.S.C. § 824d(a); Kelliher, *supra* at 2–3. In order for courts to affirm FERC's decision that a rate is unreasonable, the rate must fall "outside the zone of reasonableness." *See id.* Where a competitive market exists, FERC may rely on market-based rates to ensure that rates satisfy this requirement. *See id.* at 12.

The FPA, however, has expressly limited FERC's regulatory reach and clearly maintains exclusive jurisdiction for the states; FERC may not regulate within-state wholesale or retail sales of electricity. *See New York v. F.E.R.C.*, 535 U.S. 1, 17 (2002). Instead, state utility commissions are charged with regulation of these areas. *See id.* at 15. There is a "presumption against [federal] preemption [of state law]" in cases where, as in this case, the issue is a state law's conflict and subsequent supplanting by federal governmental authority. *See id.* at 17–18 (citing *Hillsborough Cty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985)). In situations where issues of preemption arise, the analysis begins with an "assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Hillsborough Cty.* 741 U.S. at 715.

In the case at hand, the District Court found the CAP program of Franklin's EDEA to be both field and conflict preempted by FERC's exclusive authority under the FPA and granted Appellee's motion for summary judgment. *See* R. at 12–13. Appellate courts review a "ruling on a motion for summary judgment *de novo* and apply the same legal standards as the district court." *Bellard v. Gautreaux,* 675 F.3d 454, 460 (5th Cir. 2012). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). When ruling on a motion for summary judgment, a court is required to review all inferences in the light most favorable to the nonmoving party. *See Exelon Wind 1 v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014). This Court should now reverse the District Court's decision and remand for trial on the merits.

A. Section 1 of the EDEA is not field preempted under the Supremacy Clause of the Constitution because FERC's authority does not reach to intrastate retail sales of electricity.

The Supremacy Clause of the U.S. Constitution establishes the Constitution and the laws of the United States to be "the supreme law of the land," allowing for congressional preemption of state law. U.S. CONST. Article VI, cl. 2. When determining a state law's preemption by a federal statute or regulation, a court should begin by assuming that state powers are not superseded by federal law unless that is the clear intention of Congress. *See Hillsborough Cty.*, 471 U.S. at 715; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In order to illustrate the existence of federal preemption, there must be a showing of "implicit preemption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough Cty.*, 471 U.S. at 716. Preemption can also occur when Congress legislates so comprehensively that it creates "'a reasonable . . . inference that Congress left no room for the States to supplement it.'" *Morgan City v. S. La. Elec. Coop. Ass'n.*, 31 F.3d 319, 322 (5th Cir. 1994) (quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983)). This is referred to as field preemption. *See Pacific Gas & Elec. Co*, 461 U.S. at 203–04.

Even after the creation of the *Attleboro* gap, many areas of electricity regulations have remained solely within the purview of the state: "[Under the FPA] [t]he States . . . retain authority over 'any other sale of electric energy' and facilities used for 'generation of electric energy,' 'local distribution,' or 'transmission of electric energy in interstate commerce.'" *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 49 (D.C. Cir. 2014). Congress has been explicit in that

the FPA does not field preempt state regulatory authority over the sale of electricity in retail. The FPA contains language that plainly demonstrates Congress' intent to not occupy the field of electricity regulations; § 824(b)(1) does not grant FERC the authority to regulate within-state wholesale sales or retail sales of electricity. *See* 16 U.S.C. § 824(b)(1); *New York*, 535 U.S. at 23. Instead, "[s]tate utility commissions continue to oversee those transactions." *Elec. Power Supp. Ass'n*, 136 S. Ct. at 768. The FPA establishes the policy-based objective of Congress "to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission." S. REP. NO. 74-621 (1935).

The FPA states that "such Federal regulation, [] extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C § 824(a). The Supreme Court has interpreted FERC's regulatory abilities narrowly, finding that Congress has preserved state regulatory ability in this area—for instance:

> [Section] 824(b) "limit[s] FERC's sale jurisdiction to that at wholesale," reserving regulatory authority over retail sales (as well as intrastate wholesale sales) to the States. FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates. Suppose, to take a far-fetched example, that the Commission issued a regulation compelling every consumer to buy a certain amount of electricity on the retail market. Such a rule would necessarily determine the load purchased on the wholesale market too, and thus would alter wholesale prices. But even given that ineluctable consequence, the regulation would exceed FERC's authority, as defined in § 824(b), because it specifies terms of sale at retail—which is a job for the States alone.

Elec. Power Supply Ass'n, 136 S. Ct. at 775. Furthermore, Congress envisioned the collaboration of state and federal governments in regulating electricity. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (stating that "the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by

interdependence."). Where a practice may affect both wholesale and retail prices, the court should look to the state's purpose and determine that the state is not trying to set interstate rates. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599–1600 (2015) (determining that Supreme Court "precedents emphasize the importance of considering the target at which the state-law claims aim"). For instance, in *Oneok*, the Supreme Court did not find preemption because the state regulation was aimed at regulating retail natural gas prices, despite the fact that the regulation also affected wholesale natural gas prices, something traditionally within FERC's exclusive jurisdiction. *See id*. at 1594; *see also N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 83 S. Ct. 646, 652 (1963).

The State of Franklin's CAP program is not field preempted by the FPA because the program is not intended to interfere with wholesale power markets by setting higher above-market prices for electricity sold by subsidized generators. Instead, Franklin is seeking to revitalize the coal industry and secure economic viability. Franklin, here, is offering optional ten-year contracts to plants that meet specific guidelines. R. at 7. Additionally, Franklin's PSC seeks to set retail rates to recover the costs of its CAP program for those electric customers located within Franklin. R. at 7. The PSC has initially determined to set the CAP at $18.50 per megawatt hour. R. at 7. The PSC looked at a number of factors in determining this rate, including expert testimony, looking at relative bids for capacity into the PJM capacity markets, as well as the comments submitted by participants in the PSC's rulemaking proceeding. R. at 7–8.

While it is true that it is within FERC's authority to regulate wholesale prices, the State of Franklin, by offering an incentive program via CAPs, is not attempting to drive up prices within the market. Instead, the state is utilizing its police power to incentivize eligible coal-fired generation plants to allow for assistance to Franklin's economic development by ensuring a

reliable and reasonably priced electricity supply. *See* R. at 4. Franklin is setting retail rates only for electricity customers who are located within the state's own borders. R. at 7. "Fostering and incentivizing the development of a limited program for new electric generating facilities help[s] ensure sufficient capacity and stabilize lower prices, as well as creat[es] opportunities for employment in [Franklin's] energy sector." R. at 4.

The State of Franklin is not looking to affect interstate commerce, or even to affect anything or anyone outside of its own borders. The main concern in enacting the EDEA was Franklin's use of its own resources and the effects of the failure of the PJM's capacity market to provide incentives to encourage development of new generating capacity. Franklin has looked to within its own borders to attempt to sustain its economic viability and reliable and efficient energy for its citizens by allowing existing coal-fired generation to continue operating, and to support economic growth within Franklin, and expanding employment opportunities by providing an availability to a reliable electrical supply within the state. "Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989).

While one of the five CAP-eligible coal-generating plants does touch territory outside of the State of Franklin, Franklin garners almost all its energy from within its own borders. The PSC made express findings as to the contributions each of these eligible units has made to the "electricity generating mix consumed by retail electricity customers within Franklin." R. at 7. Despite that one of its coal-generating plants is located in the state of Vandalia, it is not important "whether out-of-state energy gets into local distribution facilities . . . [t]he test is whether they are local distribution facilities." *See Conn. Light & Power Co. v. Fed. Power*

Comm'n, 324 U.S. 515, 531 (1945). Here, Franklin's policies affect only three LMP zones, which are subsets to the larger PJM operating region. R. at 7. Here, because the energy generated by these facilities is distributed within the borders of the state of Franklin and the EDEA does not touch on interstate commerce, FERC's authority in this area is not field preempted. Congress intended for federal and state law to work hand-in-hand—it was not Congress' intent for the FPA to entirely flood the field of state regulatory ability, including Franklin's EDEA. Because the FPA leaves room for state regulation, it cannot be inferred that Congress' intent was to occupy the field of electricity regulation. Section 824(a) expressly leaves room for the states to supplement existing federal law. 16 U.S.C § 824(a). Likewise, the federal interest is not so dominant in this field that the federal energy system can be assumed to preclude the enforcement of Franklin's EDEA. Therefore, Franklin's Energy Diversification and Expansion Act is not field preempted by the Federal Power Act, and the District Court erred when granting summary judgment to Appellee on this basis.

B. Section 1 of the EDEA is not conflict preempted under the Supremacy Clause of the Constitution, as the CAP scheme does not interfere with FERC's purposes and objectives of just and reasonable rates and reliable energy.

The second, and last, form of federal preemption is conflict preemption, wherein state law is displaced to the extent that it conflicts with federal law. *See Morgan City*, 31 F.3d at 322. This may occur in two ways: (1) "a provision of state law may be incompatible with a federal statute such that compliance with both is a 'physical impossibility,'" or (2) "'even if compliance with both is not impossible, state law is nonetheless preempted if its application would disturb, interfere with, or seriously compromise the purposes of the federal scheme.'" *Id*. In *Hughes v. Talen Energy Marketing, LLC*, the State of Maryland impeded FERC's authority, as it was seeking to "guarantee CPV a rate different from FERC's just and reasonable rate [that]

contravened the goals of the Federal Power Act." *See Talen Energy Mktg.*, 136 S. Ct. 1288, 1300 (2016). "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from [a] fatal defect [under the FPA]." *Id.* at 1299. FERC does have exclusive authority in interstate matters, and "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." *Id.* at 1300. As previously discussed, Congress did not intend for FERC to overthrow state regulatory ability in this area—it was created to coexist with state regulatory schemes. *See id.* (Sotomayor, J., concurring). As Justice Sotomayor explained in her concurring opinion in *Hughes v. Talen Energy Marketing, LLC*, state regulation is not meant to impede federal regulation in this area, but rather, the two are interdependent:

> The process through which consumers obtain energy stretches across state and federal regulatory domains. The Federal Power Act authorizes the States to regulate energy production. 16 U.S.C. § 824(b). It then instructs the Federal Government to step in and regulate wholesale purchases and energy transportation. § 824(a). Finally, it allows the States to assume control over the ultimate sale of energy to consumers. § 824(b) . . . The Court, however, also rightly recognizes the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy.

Id. The FPA does not create a scheme that preempts state regulation of electricity; instead it attempts to preserve state authority and work with it. *See* 16 U.S.C. § 824(a); *see also Oxygenated Fuels Ass'n v. Davis* 331 F.3d 665, 570 (9th Cir. 2003).

In the case at hand, conflict preemption does not exist because the CAP program is not a barrier to any of FERC's objectives. Where FERC has exclusive jurisdiction to oversee interstate wholesale rates, Franklin is only regulating intrastate retail rates to achieve the State's own objectives. The standard for conflict preemption is a high standard to meet; the state would be required to stand as an obstacle to the disappointment and execution of the purposes of Congress

in order for it to be conflict preempted. The state here is acting within an area reserved to the state—offering assistance to in-state facilities and setting retail rates for electric customers located within Franklin. Furthermore, unlike Maryland in *Hughes v. Talen Energy Marketing, LLC*, Franklin has not conditioned their funds on LSEs and CPVs clearing the PJM auction sales, nor has it mandated long-term contracts. Here, the contracts offered by Franklin to the five coal-generating providers are an optional ten-year contract. R. at 7.

The State of Franklin is attempting to use its own natural resources—coal, in this instance—to provide an economic boost and to provide its citizens with a reliable and reasonably priced electricity. In doing so, they are not creating an obstacle to Congress's purpose in the FPA. Instead, they are helping to achieve the purpose of the statute, and in turn, encouraging collaboration between state and federal law. Franklin is not interested in managing wholesale rates. Instead, the state is primarily interested in managing retail rates to achieve reliability in its energy sector and the provision of a rate that is both just and reasonable. Section 1 of the EDEA is therefore not conflict preempted by the FPA, and the District Court erred in granting summary judgment to the Appellee. Accordingly, this Court should reverse the District Court's ruling and remand this case for trial on the merits.

II. Franklin's Energy Diversification and Expansion Act is not in violation of the Dormant Commerce Clause, as it does not unduly burden interstate commerce with the goals of its RPS functions.

The United States Supreme Court has consistently interpreted the Commerce Clause to imply a further authority, known as the Dormant Commerce Clause, prohibiting certain state regulation even when Congress has failed to legislate on the subject. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). The Court has understood this interpretation as promoting the Commerce Clause's purpose of preventing a state from imposing economic

protectionism. *See id.* at 176. In a Dormant Commerce Clause analysis, the court must inquire whether the law discriminates against interstate commerce; specifically, absent discrimination against interstate commerce, the law is upheld "unless the burden imposed on interstate commerce is clearly excessive in relation to putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If there is discrimination, facially or in purpose or effect, the law survives only if it advances a legitimate local purpose that cannot be effectively served by any reasonable non-discriminatory alternatives. *See generally id.* Through the application of this balancing test, even nondiscriminatory burdens on commerce can be struck down under the dormant aspect of the Commerce Clause on a showing that they clearly outweigh the benefits of a state or local practice. *See generally id.* Additionally, the Supreme Court has stated that the examination of statutory purpose in statutory interpretation is a key element under this balancing test and that a discriminatory purpose is relevant to a Dormant Commerce Clause claim. *See McReary Cty., Ky. v. Am. Civil Liberties Union Ky.*, 545 U.S. 844, 861 (2005).

A. Section 2(a) of the EDEA is constitutional under the Dormant Commerce Clause because Franklin's regulation of "certified biomass feedstock" areas falls under the state's police powers in relation to the environment and diversification of energy generation.

The principle against protectionism in interstate trade applies to all items traded in interstate commerce, including those related to the environment, such as renewable portfolio standards (RPS). *See Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978). RPS are designed to make renewable energy competitive with other sources of energy over a long-term period. Kirsten H. Engel, *The Dormant Commerce Clause Threat to Market-Based Environmental Regulation: The Case of Electricity Deregulation*, 26 ECOLOGY L. Q. 243, 262 (1999). An RPS requires that a specified percentage of the energy in a retailer's portfolio be derived from renewable power sources. *Id.* Such an incentive-based market approach calls into

question whether the benefits reaped by other states from another state's institution of environmental regulatory mechanisms, and the restrictions imposed thereon to limit these benefits by erecting trade barriers, are a restriction of the free-market, and thus pose a violation to the Dormant Commerce Clause. *See id.* at 250.

Trade barriers, such as in-state RPS, should be found constitutional when they are enacted to: (1) retain the benefits of an incentive-based environmental state-created market; (2) prevent the loss of the benefits generated by citizen investment in environmentally sensitive production processes; or (3) to stem the flow of economic benefits gained by the state's internalization of the environmental costs of production. *See id.* Simply put, "the Commerce Clause should not void state regulation that attempts to prevent free benefits from accruing to other states." *Id.* There are two reasons to find statutes enacted for the above purposes constitutional. First, "[r]ather than creating an economic advantage for in-state industries at the expense of out-of-state industries, these barriers prevent the loss of in-state economic and environmental benefits. . . ." *Id.* Second, environmental regulations pose a special exception to the Dormant Commerce Clause; economic regulations correct the market's failure to internalize the cost of pollution or generating public goods, e.g., clean air. *See id.* at 251. Since the underlying justification of the Dormant Commerce Clause is to achieve economic efficiency, regulations that attempt to cure a market failure should be tolerated. *Id.*

The main purpose of the Commerce Clause is to prevent state regulations from achieving economic protectionism. *See* U.S. CONST. Art. I, § 8 cl. 3. In-state RPS are void of any protectionism motivations. *See* Engel, *supra* at 250. Likewise, laws are upheld only if necessary to achieve an important state interest and no other less discriminatory means are available. *See Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979). A court will strike the law only if (a) they

believe the asserted state or local interest is negligible or negligibly promoted and (b) the burden on interstate commerce is truly excessive. *See generally N.Y. State Rifle Ass'n v. City of N.Y*, 86 F. Supp. 3d 249 (S.D.N.Y 2015). Moreover, Courts have made exceptions when the state is exercising a recognized area of state jurisdiction such as protection of "health, safety, the environment and natural resources in the diversification of renewable resources in the state energy mix." *See generally Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

The EDEA's language defines certified biomass feedstock as a "Designated Biomass Growing Region" as determined by both the Franklin Department of Natural Resources and the Franklin Division of Commerce. R. at 9. Franklin currently has only two such designated regions. R. at 9. One region straddles the Franklin-Vandalia state line; the other region is wholly within Franklin's own borders. R. at 9. Appellee will argue that the market participation doctrine does not apply to the EDEA since the regulated utilities are privately owned. However, Franklin's act of subsidizing the same private companies does fall under the market participation doctrine. The doctrine is an exception to the Dormant Commerce Clause. Franklin is participating in the market, not just regulating it. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809–10 (1976). The market participation doctrine specifically states that the Commerce Clause, in the absence of congressional action, does not go so far as to limit Franklin from participating in its own free market. Subsidizing private actors does exactly that: Franklin has a deregulated electricity market and, just as taxation falls under a state's police powers, Franklin can make use of subsidies to direct market participants towards renewable resources and a healthy economy. Hence, Franklin itself is also a market participant.

Appellee will also argue that the State of Franklin will not survive strict scrutiny. This argument falls short because the EDEA is narrowly tailored. However, Appellee makes use of

the incorrect standard because courts have carved out an exception for burdens on interstate commerce enacted to protect the state's health, safety, environment, or fossil fuel natural resources through a diversified renewable energy portfolio. *See generally* Steven Ferrey, *Renewable Subsidies in the Age of Deregulation*, FORTNIGHTLY MAG. (Dec. 1997). Under this exception, the more deferential balancing test would be applied to the regulation. *Id*. Courts would then weigh the balance between the restrictions against burdens on interstate commerce and a state's right to protect its health, safety, environment, and natural resources. *Id.*

"'Laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism; [w]e should be particularly hesitant to interfere . . . under the guise of the Commerce Clause' where a local government engages in a traditional government function." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 341 (2008). Where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the recognized local benefit. *Pike*, 397 U.S. at 142. If the State law evenhandedly apples to in-state utilities and out-of-state utilities, then the law is neutral. *See Pike*, 397 U.S. at 142; *see Hughes v. Oklahoma.*, 441 U.S. at 331–32. In this case, Franklin's legitimate goal is within its traditional government function and within its police powers to provide for substantial environmental benefits and to utilize its substantial biomass resource potential, considering it is the third most-forested state in the country. Likewise, there are no less discriminatory means available to achieve Franklin's purpose. Biomass itself is a cleaner alternative to coal. Here, Franklin substantially relies on coal, therefore, diversifying its portfolio with biomass decreases its carbon output sources and also moves towards Environmental Protection Agency compliance. Franklin is using its resources, its abundant forests, and

concurrently creates more jobs for its population. This is wholly within its police powers as a state. Neither does the EDEA overtly or covertly discriminate against interstate commerce. Franklin is within its right to favor its own citizens over the citizens of other states. *See Alexandria Scrap Corp.*, 426 U.S. at 809–10. Because the EDEA survives the balancing test set forth above, the District Court was premature in granting Appellee's motion for summary judgment; as such, this case should be remanded for trial on the merits.

B. Section 2(b) of the EDEA does not violate the Dormant Commerce Clause because "eligible facilities" is not a discriminatory term, even when such facilities are entirely within the State of Franklin.

"State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). In the context of this doctrine, discrimination refers to the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Energy and Env't Legal Inst. v. Epel*, 43 F. Supp. 3d 1171, 1178 (D. Colo. 2014); *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

Despite its facially discriminatory nature when referring to "eligible facilities," the EDEA does not substantially impact interstate commerce to run afoul of the Dormant Commerce Clause. *See Davis*, 553 U.S. at 341. Franklin's EDEA survives the discrimination prong of a Dormant Commerce Clause analysis because the balancing test applicable here differs from a strict scrutiny analysis. The EDEA is not facially discriminatory because of the strict construction of the Act's language. However, even if the EDEA's language in § 2(a)(4)—"an area within the state of Franklin and the adjoining states thereto"—and its requirement for in-state sources of renewable energy was found to be facially discriminatory against out-of-state producers of biomass feedstock, scholars have asserted that in-state RPS should survive facial discrimination attacks against the Dormant Commerce Clause. *See* Engel, *supra* at 259. When a

state mandates a specific percentage of electricity generation capacity to be from in-state renewable sources, utilities have often argued that the in-state RPS would be discriminatory to the interstate trade of renewable energy credits (RECs). In fact, however, a market for RECs does exist and is allowed in several states. *See id.* at 264, n. 60. For instance, RPS have been enacted by Nevada, New Jersey, Connecticut, and Arizona, and all authorize, either explicitly or implicitly, state regulators to implement the standard through a tradable credit scheme. *Id.*

Here, one of Franklin's legislative objectives was to stimulate the development of Franklin's biomass industry. R. at 3. The majority of the State of Franklin—77%—is covered in forests; in fact, Franklin is the third most forested state in the country. R. at 3. The residues produced during harvesting of wood products could provide sufficient feedstock to support a biomass industry for co-firing with coal at generating plants and biomass fired small production facilities. R. at 3. Moreover, in Franklin's RPS, 30% of energy is to come from renewable sources, e.g., biomass. R. at 8. "Any tax upon products within interstate commerce will survive a Commerce Clause challenge if it is 'applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the service provided by the State.'" S. Michael Gray, *Can State Regulation of Renewable Electricity Achieve Discriminatory Effects on Interstate Trade Without Triggering the Dormant Commerce Clause?*, 44 S. TEX. L. REV. 783, 786 (2003) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 247, 279 (1977)). Here, Franklin's EDEA meets all the above-listed criteria: the activity maintains a substantial nexus to the State of Franklin, as the RPS's are provided as incentives for use of eligible facilities within the state, but are not requirements; it is fairly apportioned; does not discriminate against interstate commerce—incentives are not

necessarily discriminatory; and Franklin's pragmatic use of the natural resources within its borders is a fairly related service provided by the state.

Franklin's EDEA is also constitutional because it does not discriminate in purpose or effect. The RPS was provided as an incentive—it was not a requirement to be abided by. As such, options always remain available for use of other cogeneration facilities other than those exclusively within the state of Franklin. Therefore, Franklin's EDEA survives the *Pike* balancing test here because the benefits accrued from implementation of the EDEA outweigh the burden on interstate commerce. Franklin's EDEA is not motivated solely by simple economic protectionism.[3] Overall, since the EDEA is not overtly discriminatory against out-of-state producers, there is a presumption in favor of upholding the law, and the EDEA will only be invalidated if it is shown that the it's burdens on interstate commerce are clearly excessive to its benefits. As such, the EDEA is not in violation of the Dormant Commerce Clause and the District Court should not have granted Appellee's motion for summary judgment. This case should be reversed and remanded for trial on the merits.

CONCLUSION

Because the State of Franklin's Energy Diversification and Expansion Act CAP program is neither field nor conflict preempted by the Federal Power Act, and because it's RPS program is not in violation of the Dormant Commerce Clause, the State of Franklin respectfully requests that this court reverse the District Court's granting of Appellee's motion for summary judgment and remand for trial on the merits.

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[3] EDEA addresses grid reliability, efficiency, diversification, inexpensive electricity to consumers, sustainability of natural resources, economic stimulation, decreases barriers to entrance and competitive market, and guarantees peak performance during times of highest demand. *See* R. at 4–5.

Respectfully submitted,

*/s/ Team No. 6*_______
Team No. 6

Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellant certify that our *Team* emailed the PDF version of this brief 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 Standard Time, on February 13, 2017.

Respectfully submitted,

/s/ *Team No. 6*_____

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