IN THE UNITED STATES COURT OF APPEALS FOR THE

TWELFTH CIRCUIT

BRIEF FOR APPELLEE

State of Franklin, *Appellant,*	)	
v.	)	Case No. 16-02345
Electricity Producers Coalition *Appellee.*	)	

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Jurisdictional Statement

The Federal District Court for the Eastern District of Franklin had subject matter jurisdiction to hear these issues under 28 U.S.C. § 1331 because the claims arise under federal law, specifically the Supremacy Clause and the Commerce Clause of the United States Constitution. U.S. Const., art. VI, cl. 2; U.S. Const., art. I, § 8, cl. 3. The Twelfth Circuit Court of Appeals has jurisdiction to hear this case because the Federal District Court for the Eastern District of Franklin resolved the case by granting EPC's motion for summary judgment on November 7, 2016 and a timely appeal was filed with the Twelfth Circuit on December 6, 2016. F. R. App. P. 4. The issues in this case are all issues of law and should be reviewed *de novo* by the Twelfth Circuit Court of Appeals.

Statement of the Issues

1. Whether Section 1 of the EDEA, as enacted by Franklin and administered by the Franklin Public Service Commission ("PSC"), is "field preempted" under the Supremacy Clause of the U.S. Constitution, given the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce.
2. Whether Section 1 of EDEA, as enacted by Franklin and administered by the Franklin PSC, is "conflict preempted" under the Supremacy Clause of the U.S. Constitution, given that FERC—the agency charged with administering the Federal Power Act—has determined that market-based processes approved and overseen by FERC are the preferred means of achieving a reliable and reasonably priced electricity supply within the U.S.

3. Whether Section 2(a) of EDEA, as enacted by Franklin and administered by the Franklin PSC (and other state agencies in Franklin), is invalid under the dormant Commerce Clause of the U.S. Constitution, given the geographic limitation of "certified biomass feedstock" under EDEA to areas primarily located within the state of Franklin.
4. Whether Section 2(b) of EDEA, as enacted by Franklin and administered by the Franklin PSC, is invalid under the dormant Commerce Clause of the U.S. Constitution, given the geographic limitation of "eligible facilities" to customer- sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin.

Statement of the Case

EPC commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin. The suit was filed following Franklin PSC's issuance of its EDEA Implementation Order and issuance of the Biomass Eligibility Determination Order. EPC sought a declaratory ruling that the CAP program violates the Supremacy Clause of the U.S. Constitution, and the modifications to Franklin's RPS violate the dormant Commerce Clause of the U.S. Constitution. EPC also sought injunctive relief to prevent EDEA from being implemented until the legal issues could be resolved.

Shortly after the action was commenced, EPC and Franklin filed cross-motions for summary judgment. On November 7, 2016 the District Court granted EPC's motion for summary judgment finding that: (1) Section 1 of the EDEA was both field preempted and conflict preempted under the Supremacy Clause of the U.S. Constitution, and (2) Section 2(a), (b) of the EDEA were invalid under the dormant Commerce Clause of the U.S. Constitution.

The District Court did not reach the dormant Commerce Clause claims asserted by EPC with respect to Section 1 of the EDEA.

In Franklin's appeal it denies that its CAP program is preempted by the Federal Power Act, and thus does not violate the Supremacy Clause of the U.S. Constitution. With respect to the challenged elements of its RPS, Franklin submits that its program to encourage co-firing of "certified biomass feedstock" with coal is within its authority to regulate generation facilities and retail sales. Franklin contends that the purpose of the provision is not to discriminate against out-of-state renewable resources, but rather to capture the unique benefits of customer-sited generation. EPC supports the District Court's findings, which largely accepted the claims advanced by EPC in its motion for summary judgment. For strategic reasons EPC is no longer asserting its dormant Commerce Clause claims with respect to Section 1 of the EDEA in this appeal.

This Court should affirm the District Court's decision to invalidate Section 1 of the EDEA because the regulation is both field and conflict-preempted under the Supremacy Clause of the U.S. Constitution. Additionally, it should affirm the District Court's decision to invalidate Section 2(a) and (b) of the EDEA because both sections run afoul of the U.S. Constitutions well established dormant Commerce Clause.

Statement of the Facts

Finding the Energy Diversification and Expansion Act (hereinafter "EDEA") unconstitutional under the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution, the U.S. District Court for Eastern District of Franklin granted declaratory and injunctive relief for the Electricity Producers' Coalition (hereinafter "EPC"). In January 2016,

the State of Franklin enacted EDEA in January 2016. In February 2016, Franklin's Public Service Commission (hereinafter PSC) initiated a proceeding to implement EDEA. After three months of workshops and an expedited informal rulemaking process, the PSC issued an EDEA Implementation Order in June 2016.

This process was initiated in an attempt to resolve the recent coal production decline in Franklin. The availability of cheap natural gas and renewable resources such as wind and solar resources, helped Franklin's coal revenue decline. Furthermore, Environmental Protection Agency regulations also hurt Franklin's reliance on coal energy production. Seventy-seven percent of Franklin is covered with forests. It is the third most forested state and the third most coal-producing state in the United States. Research has demonstrated that harvesting forests may support biomass industry. As a result, in January 2016 Franklin enacted the EDEA with the goal of attempting to preserve the state's existing coal-fired generating plants. This Act also aimed to stimulate biomass industry development. When the EDEA was passed, Franklin's energy production consisted of the following: electricity was: 82% coal, 10% natural gas, 5% wind, 2% biomass, 1% solar photovoltaic (PV).

The EDEA has three general provisions. The first provision aims to provide financial incentives in the form of Carbon Assistance Payments (hereinafter "CAP"). This process provides assistance to eligible coal-fired generating plants who serve Franklin. Under this plan, Franklin's PSC determines power plant eligibility and setting the level of CAP's.

The second general provision of the EDEA modifies Franklin's existing Renewable Portfolio Standard (hereinafter "RPS"). This modification requires electric distribution companies to procure a portion of their electricity supply from electric generating plants that are co-fired with coal and biomass. EDEA, Section 2(a). Furthermore, it requires that the biomass

portion be "certified biomass feedstock" with a 15 percent of the generating plant's fuel supply. The third general provision also modifies the existing RPS to include a carve-out for customer-sited combined heat and power (hereinafter "CHP") or cogeneration facilities fueled with biomass. EDEA, Section 2(b).

In addition to the general provision, the Franklin legislature listed in the EDEA preamble states that several reasons why the state needed this piece of regulation. The Legislature explained that retiring coal-fired generating plants were threatening Franklin's economic growth and employment opportunities. Additionally, the Pennsylvania New Jersey Maryland Interconnection, (hereinafter "PJM") manages the regional electric power grid serving Franklin, but lacks the authority to order new generation to alleviate part of the local electrical system reliability concerns. However, PJM failed to provide necessary incentives to encourage development of new generating capacity within the Mid-Atlantic region. As a result, Franklin is now dealing with capacity deficiencies. Furthermore, the legislature claims that there was public interest in this regulation. The EDEA provides additional financial support for existing coal-fired generating facilities and ensures reliable and reasonably priced electricity supply. These incentives will benefit Franklin's economy. In addition to financial incentive benefits, the EDEA will help sufficient capacity and stabilize power prices while creating new employment opportunities for Franklin's energy sector. Not only is the economy benefited, but the EDEA provides environmental benefits. Under the regulation, any displacement of pulverized coal with sustainably harvested biomass will result in reduced greenhouse gas emissions from electric generating resources. Also, by supporting co-firing biomass with coal, Franklin's electric generating portfolio will diversify and as a result reduce the volatility of power prices.

Franklin's legislature wanted to take advantage of the substantial amount of forests in the state. The EDEA offers sustainable harvesting of its biomass resources. As a result, this regulation aimed to foster and incentivize the development of distributed energy resources (hereinafter "DERs"). These DERs offer several benefits. They increase the resilience of electric utility grid, reduce transmission, reduce distribution costs, and provide additional tools for customers to manage their energy costs. These DERs are fueled with sustainably harvested biomass would reduce the environmental impact of energy industry. This would further develop Franklin's biomass industry. Furthermore, in addition to the benefits of the DERs, the CHPs help reduce customer energy cost and offer the environmental and economic benefit of being energy efficient. These EDEA proposed benefits attempted to modify the current electricity market in Franklin.

Regarding Franklin's electricity markets, the Electronic Customer Choice and Competition Act of 1996 introduced energy competition at the retail level. It allowed wholesale from independent power producers. This would take the form of either a bilateral contract or the wholesale markets administered by Regional Transmission Organizations (hereinafter "RTOs") or Independent System Operators (hereinafter "ISOs"). However, as required by Congress, under this system both independent and non-profit entities are regulated by FERC.

Importantly, the PJM Interconnection is an ISO and serves almost all of the 13 mid-Atlantic and Midwestern's states, the District of Columbia, and Franklin. Within the PJM's service jurisdiction, there are 21 location marginal pricing zones (hereinafter "LMP"). LMPs are geographical areas within the PJM service area. These LPMs use market-based pricing as means for reflecting the impact of transmission congestion. As a result, they reflect the supply and demand of the service area.

Issuing an EDEA Implementation Order in June 2016, PSC stated that for the ten year contract period, the Commission identified five coal-fired generating plants, with an aggregate generating capacity of 3500 megawatts. The Commission set the CAP at $18.50 per MWh. This limited was decided partially on a retained power supply expert. Furthermore, the findings and comments submitted by participants in the PSC rulemaking process helped the Commission determined the $18.50/MWh CAP requirement. The Commission stated that the CAP program started on September 1, 2016.

Franklin's existing Renewable Portfolio Standard ("RPS") enacted in 2007, generally requires utilities selling electricity to generate or purchase a specific percentage of its electricity supply from renewable sources. If those percentages are not met the utility company must pay set penalties. The RPS requires that by the year 2020 twenty percent of all electricity sold to retail customers must come from renewable sources, this percentage is set to increase to thirty percent by 2030. Franklin's RPS recognizes a number of different renewable sources as acceptable under this standard, including biomass.

The existing RPS was set to be modified in accordance with the EDEA, which was enacted in January of 2016. The Franklin PSC has primary authority over the administration of the RPS and was charged with implementing the changes embodied in the EDEA. Section 2(a) of the Act included an additional requirement imposed on electric distribution utilities to procure a specified percentage of their electricity supply for retail customers within Franklin from electric generating plants fired with a fuel supply comprising coal and no less than fifteen percent certified biomass feedstock. Section 2(a) sets the procurement obligation for electricity generated at co-fired power plants at 3% beginning in 2020 and growing to 5% in 2030.

Section 2(a)(3) defines "certified biomass feedstock" as biomass feedstock that is harvested from a forest identified by the Franklin Department of Natural Resources and the Franklin Division of Commerce as a "Designated Biomass Growing Region" pursuant to Section 2(a)(4) of this Act. Section 2(a)(4) defines the Designated Biomass Growing Regions 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."

The Franklin Department of Natural Resources and Division of Commerce initiated a joint proceeding in February 2016 to implement the Act in accordance with the above guidelines. The agencies issued their Biomass Eligibility Determination Order in June 2016 which officially identified only two Designated Biomass Growing Regions: 756 acres of the Franklin-Allegheny State Forest, and 422 acres of the Central Appalachian Forest. The Franklin-Allegheny State Forest straddles the Franklin-Vandalia state line with 506 acres within Franklin and the remaining 256 acres within Vandalia. The Central Appalachian Forest is entirely within Franklin. The Department of Natural Resources determined that both of these forests feature species of trees particularly suited for biomass used for generating electricity. Additionally, the Division of Commerce found that the five counties in Franklin, which fall within these designated regions have unemployment rates ranging from 9.7 to 14.6 percent and have suffered

disproportionately from the downturn in the coal industry. The Division of Commerce made no findings with respect to the economic status of the counties located within Vandalia.

The Franklin PSC additionally has authority over the implementation of Section 2(b) of the Act which modified the existing RPS to include a "carve-out" for customer-sited CHP (or cogeneration) facilities fueled with biomass that are connected to the distribution grid of an electric distribution utility serving customers within Franklin. The "carve out" requires certain portion of the renewable energy required under the existing RPS be procured from a particular source (in this case, from customer-sited, biomass-fueled CHP facilities) Section 2(b) sets procurement obligation category of sources at 0.5% beginning in 2020 and growing to 1.0% by 2030. Section 2(b) does not require fuel for eligible CHP facilities to be "certified biomass feedstock." Because CHP facilities must be located on the customer side of the meter and be connected to the distribution grid of a company serving customers within Franklin, all eligible CHP facilities are by necessity located exclusively within the state of Franklin.

Summary of the Argument

When Congress legislates in a field traditionally governed by the States, a presumption exists that state regulation in the field is not preempted unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe. Elevator Corp.*, 331 U.S. 218. 230 (1947). When explicit preemptory language is absent, courts may infer Congress' intent to totally supplant state law if the "scheme of federal regulation" in a field is so pervasive and "dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Electric Co.*, 495 U.S. 72, 79 (1990). Under the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). By inflating the market

prices offered by certain generators, the CAP program under Section 1 of the EDEA interferes with FERC's statutory authority to regulate capacity prices and ensuring that such rates are just and reasonable. Because rate setting in the wholesale market is the sole statutory authority of FERC, Section 1 of the EDEA is field preempted.

Congress' power to preempt certain state law claims for conflict preemption under the Constitution's Supremacy Clause is "unquestioned." Stephen A. Gardbaumt, *The Nature of Preemption*, 79 CORNELL L. REV. 767 at n.2 (quoting William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption, in Courts and Free Markets: Perspectives from the United States and Europe* 523, 537 (Sandalow & Stein eds., 1982)). As a result, the Supreme Court has opined that "state law is preempted" by federal law if the state law directly contradicts or is an "obstacle" to Congress' intent. *See generally Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220–21 (1983) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 (1941)). Here, the EDEA is conflict preempted. Congress, under the Federal Power Act, gave the Federal Energy Regulatory Commission (hereinafter "FERC") the power to regulate specific aspects of the energy market. *See generally Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). The EDEA infringes on FERC's broad authority to regulate energy and interstate electricity markets. EDEA's Carbon Assistance Payments (hereinafter "CAP") system interferes with the FERC's regulatory and rate setting authority. The CAP system inserts Franklin's state law into an energy market which is under FERC's reliable and reasonable authorization. As a result, FERC is the proper regulatory authority and the EDEA is conflict preempted and therefore unconstitutional.

The Commerce Clause of the United States Constitution provides that "the Congress shall have Power … to regulate Commerce … among the several States…." Art. 1, § 8, cl. 3. It is

long established that the Commerce Clause is not only a grant of power to Congress, but also directly limits the power of the States to discriminate against interstate commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (citing, *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)). This negative aspect of the clause is commonly referred to as the dormant Commerce Clause. Section 2(a) of the EDEA as enacted and administered, is invalid under the dormant Commerce Clause, given the geographic limitation of "certified biomass feedstock" to areas primarily located within the state of Franklin. The guidance offered under Section 2(a)(4) outlining how state agencies are to select a Designated Biomass Growing Region is facially discriminatory towards interstate commerce as it defines the appropriate regions as falling within Franklin or an adjoining State. Facial discrimination of this nature amounts to economic protectionism. When a state's legislation is protectionist, a virtual *per se* rule of invalidity has been erected. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Even if this Court determines Section 2(a) is not facially discriminatory, the regulation will still be subjected to strict scrutiny because it is discriminatory in purpose and effect. Under either of these theories used to prove discrimination the regulation must withstand strict scrutiny. Franklin has the burden of demonstrating the modifications to the existing RPS serve a legitimate local purpose and that there is an absence of nondiscriminatory alternatives. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). Although Franklin may be able to demonstrate that the modifications under Section 2(a) serve a legitimate local purpose, it certainly will not be able to prove that the section uses the least discriminatory means available. Section 2(a) of the EDEA should be struck down as unconstitutional under the dormant Commerce Clause.

Section 2(b) of the EDEA as enacted and administered is also invalid under the dormant Commerce clause due to the geographic limitation of "eligible facilities" to customer-sited

generation connected to the grid of electric distribution utilities serving customers in Franklin. Unlike Section 2(a), Section 2(b) is facially neutral. However, Section 2(b) is discriminatory in purpose and effect, seeing as by definition all "eligible facilities" must be located within Franklin there is no opportunity for competition from companies outside the state. Based on the discriminatory effect of this section, Franklin has the burden of overcoming strict scrutiny and demonstrating a legitimate local purpose and that the same purpose could not be achieved by any less discriminatory means. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). Franklin will not be able to carry that burden and this Court should affirm the District Court's decision invalidating Section 2(b) under the dormant Commerce Clause.

Arguments

I. Section 1 of the EDEA as enacted by Franklin and Administered by Franklin Agencies is field preempted under the Supremacy Clause of the United States Constitution

The basis of federal authority to preempt state law is found in the Supremacy Clause of the United States Constitution, which provides that:

> "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

When Congress legislates in a field traditionally governed by the States, a presumption exists that state regulation in the field is not preempted unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe. Elevator Corp.*, 331 U.S. 218. 230 (1947). When explicit preemptory language is absent, courts may infer Congress' intent to totally supplant state law if the "scheme of federal regulation" in a field is so pervasive and "dominant that the federal

system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Electric Co.*, 495 U.S. 72, 79 (1990).

a. The Federal Energy Regulatory Commission is the exclusive regulator in the field of wholesale electricity sales under the Federal Power Act

Under the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The FPA assigns to FERC responsibility for ensuring that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable." §824(d)(a). One of the FERC's means of ensuring just and reasonable rates is through its extensively regulation of the structure of ISO and RTO capacity auctions to ensure an efficient balance of supply and demand. See *FERC v. Electric Power Supply Assn.*, 136 S.Ct. 760, 769 (the clearing price is "the price an efficient market would produce").

b. The CAP scheme under Section 1 of the EDEA interferes with FERC's regulation of wholesale electricity markets

In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court affirmed a ruling by the Fourth Circuit which reasoned that state laws are preempted when they "den[y] full effect to the rates set by the FERC, even though [they do] not seek to tamper with the actual terms of an interstate transaction." 136 S.Ct. 1288, 1296 (2016) (quoting *PPL EnergyPlus, LLC. v. Nazarian*, 753 F.3d 467, 476 (2014)). Relying on that conclusion, the Court found that a Maryland program designed to incentivize the construction of new power generation facilities was field preempted because it invaded the wholesale rate setting authority of FERC. See *id.* at

1297 (affirming the Fourth Circuits ruling that the Maryland Program was field preempted). Because the program adjusted the rate certain facilities received for sales at auction, the Court found that this was an impermissible infringed on FERC's statutory power to ensure just and reasonable rates for wholesale power. See *id.* at 1297 ("By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf.").

The District Court was correct in concluding that the Carbon Assistance Payments (CAPs) were field preempted for intruding on FERC's "regulatory turf." Because the coal-fired plants receive substantial out-of-market payments via the CAPs, the price they are able to charge for power is inflated above what their normal market price would be. This inflated price, in turn, inflates the market price that is used to determine the just and reasonable rates in capacity auctions overseen by FERC. Thus, like the program in *Hughes*, the CAP program effectively contributes to the setting of capacity prices by distorting the market price offered by plants receiving CAPs. *Hughes*, 136 S.Ct. at 1299. This distortion not only contributes infringes on FERCs rate setting regulatory scheme, but also infringes on the scheme's goal of ensuring the rate's reflect what an efficient market would produce. See *FERC v. Electric Power Supply Assn.*, 136 S.Ct. 760, 769 (the clearing price is "the price an efficient market would produce").

c. Section 1 of the EDEA is field preempted under the Supremacy Clause of the United States Constitution

By inflating the market prices offered by certain generators, the CAP program under Section 1 of the EDEA interferes with FERC's statutory authority to regulate capacity prices and ensuring that such rates are just and reasonable. Because rate setting in the wholesale market is the sole statutory authority of FERC, Section 1 of the EDEA is field preempted.

II. Section 1 of the EDEA as enacted by Franklin and administered by Franklin agencies is Conflict Preempted under the Supremacy Clause

Under the Constitution, Congress has an "unquestioned" power to conflict preempt certain state laws. *See* Stephen A. Gardbaumt, *The Nature of Preemption*, 79 CORNELL L. REV. 767 at n.2 (quoting William Cohen, Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption, in Courts and Free Markets: Perspectives from the United States and Europe 523, 537 (Sandalow & Stein eds., 1982)). The Constitution states that,

> "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

This clause preempts state laws that conflict with federal laws.

Recognizing this fixed federal preemption authority and constitutional principle, the Supreme Court has stated that "[i]t is well established that state law is preempted if it 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220–21 (1983) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). To determine if a state law "stands as an obstacle" to federal law, first requires courts to examine Congress' intent for that piece of legislation. Congress' intent may be implicit or explicit. *See generally Rice v. Santa Fe Elevator Corp*., 331 U.S. 244 (1947) (discussing the how courts may imply the intent of Congress from certain statutory language).

Balancing the principles of federalism, the Supreme Court first "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice,* 331 U.S. at 230. However

even when Congress' intent is not explicit, courts often use precedent and their authority to find "implied conflict pre-emption." *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–88 (1995) (discussing how courts have analyzed implied conflict preemption). Here, Congress' intent was clear and explicit in establishing FERC as the appropriate authority to regulate the reliable electricity supplies rates and markets not only in the state of Franklin, but throughout the United States.

a. The EDEA Interferes with Congress' Authorization of the FERC's Regulatory Power

Enacting the Federal Power Act (hereinafter "FPA") of 1935, Congress gave the FERC broad regulatory authority. The Supreme Court in 2016 stated that "[t]he FPA delegates responsibility to FERC to regulate the interstate wholesale market for electricity—both wholesale rates and the panoply of rules and practices affecting them." *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 (2016). Here, the EDEA, particularly the CAP provisions, impact the wholesale market, infringing on FERC's established regulatory power.

Furthermore, Congress gave the FERC broad authority to regulate energy and interstate electricity markets:

> "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824(d).

In addition to FERC's significant regulatory authority under the FPA, Congress intended for the federal agency to regulate the specific market that the EDEA attempts to influence. However, as Franklin will assert, the FPA also stated that FERC's authority should be limited "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). However,

in 2016 the Supreme Court opined that FERC has authority to regulate wholesale energy and capacity prices. *See Hughes v. Talen Energy Mktg*., LLC, 136 S. Ct. 1288, 1296 (2016) (discussing court decisions and explanations of FERC's authority to regulate energy markets and rates). Here, the EDEA provisions impact the wholesale energy and capacity prices.

While Congress' authorized the FERC to regulate the energy and prices that EDEA attempts to influence, the State of Franklin will argue that Congress left "to the States alone, the regulation of "any other sale"—most notably, any retail sale—of electricity. *F.E.R.C. v. Elec. Power Supply Ass'n,* 136 S. Ct. at 766. In *F.E.R.C. v. Elec. Power Supply Ass'n,* the Court upheld the Commission's order and stated the regulation should "pay the same price to demand response providers for conserving energy as to generators for making more of it." *Id*. at 767. Significantly, the Court emphasized that FERC had the authority to regulate these rates under it's wholesale market jurisdiction and the Commission's rule in that case addressed only wholesale and not retail markets. However, FERC's jurisdiction and authority applied to circumstances in which FERC's regulation had indirect implications on the retail market circumstances.

Here, EDEA's impact on the market is significant. Under the EDEA Section 1, Franklin's Carbon Assistance Payment (hereinafter "CAP") provision violates FERC authority. While Franklin may argue that this CAP program has similar features to the Competitive-Power Ventures of Maryland in *Hughes v. Talen Energy Mktg., LLC*, Franklin's CAP provision Section 1(a)(2) states that the CAP shall be set by the Commission while determining "the incremental capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity." EDEA, Section 1. As a result, the District Court correctly held that these CAP provisions would interfere with the FERC regulated wholesale power markets.

These CAP provisions, as the District Court stated, would assist in setting prices by PJM Interconnection (hereinafter "PJM"), which manages the regional electric power grid serving Franklin. Under the CAP program, coal-fired plants would obtain CAP's out-of-market payments which would require a higher subsidizes energy price in the market. As a result, the impact on the FERC controlled market is substantial. While the state of Franklin has a significant interest in these regulatory matters, the purpose of the federal law is clear: FERC has authority to regulate these specific energy markets. Conflicting with a federal law, the EDEA infringes on FERC's authorized power it received directly and unambiguously from Congress. Additionally, not only is FERC's purpose clear under this statute, but it has a substantial and direct federal interest in this matter. The EDEA unconstitutionally inserts state law into an energy market which is under FERC's reliable and reasonable authorization.

As a result, this CAP system interferes with the FERC's regulatory and rate setting authority. Because these determinations should be made by FERC given its authority under the FPA, and FERC's ability to regulate the wholesale market is substantially impacted by Franklin's EDEA, there is a clear conflict between state law and federal law. Because the state EDEA is conflict preempted by FERC, the EDEA is unconstitutional under the Supremacy Clause. This Court should affirm the District Courts holding and rule that the EDEA is unconstitutional.

III. Section 2(a) of EDEA as enacted by Franklin and administered by Franklin's agencies is invalid under the dormant Commerce Clause

The Commerce Clause of the United States Constitution provides that "the Congress shall have Power … to regulate Commerce … among the several States…." Art. 1, § 8, cl. 3. Read literally, this provision is a grant of power to Congress, however it is long established that the

Commerce Clause also directly limits the power of the States to discriminate against interstate commerce. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (citing, *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)). This direct limitation consistently inferred from the Commerce Clause by the Supreme Court is the negative or dormant Commerce Clause.

The general rule as applied by the Supreme Court in *Hughes* provides:

> "we must inquire (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes*, 441 U.S. at 336.

With respect to the first inquiry the burden of demonstrating discrimination against commerce falls upon the party challenging the validity of the statute. *Id.*

a. The geographic limitation of "certified biomass feedstock" to areas primarily located in Franklin is facially discriminatory against interstate commerce.

Demonstrating that the legislation is facially discriminatory requires a careful analysis of the plain statutory language. Section 2(a) of EDEA requires that electric distribution utilities procure a specified percentage of their electricity supply for retail customers within Franklin from electric generating plants fired with a fuel supply comprising coal and no less than 15 percent certified biomass feedstock. Certified biomass feedstock is biomass feedstock that is harvested from a "Designated Biomass Growing Region," as identified by the Franklin Department of Natural Resources and the Franklin Division of Commerce pursuant to Section 2(a)(4) of this Act. EDEA, Section 2(a)(3).

The discrimination is made apparent in reading the statutes definition of "Designated Biomass Growing Region," which begins "[A]n area *within the state of Franklin* and the adjoining states thereto…." EDEA, Section 2(a)(4) (*emphasis added*). Therefore, based on the

plain language of the statute, the Franklin Division of Commerce and the Franklin Department of Natural Resources are only able to apply their discretion in selecting qualifying biomass growing regions insofar as the regions fall within Franklin or an adjoining state, this defines qualifying regions based on state boarders. In drafting the legislation, the Franklin legislature precluded all states beyond that narrow parameter from competing with the local biomass producers to sell the required biomass to the electric generating plants which serve Franklins electric distribution utilities.

Facial discrimination of this nature amounts to economic protectionism, by preventing biomass harvested in states beyond this limited scope from being able to compete for these contracts. The legislation did not even provide an opportunity for renewable resource companies outside of that scope to demonstrate why they were capable of providing the same unique benefits as local harvesters. When the state legislation is protectionist, a virtual *per se* rule of invalidity has been erected. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The burden shifts from the challenging party to Franklin, which must provide a legitimate local purpose and the absence of nondiscriminatory alternatives in order to withstand strict scrutiny. *Hughes*, 441 U.S. at 337.

b. Even if the statute is not facially discriminatory, it is still discriminatory based on its discriminatory purpose

The objectives of the revised RPS include preserving the economic viability of existing coal-fired generating and stimulating the development of the biomass industry within Franklin. Franklin contends that developing the biomass industry locally is geared towards the suitability of the feedstock for co-firing with coal in power plants. The State's purpose is clear. However, Franklin may not "attempt to isolate itself from a problem common to several States by raising barriers to the free flow of interstate trade." *Chemical Waste Mgmt. Inc. v. Hunt*, 112 S. Ct.

2009, 2012 (1992). The need to develop more environmentally conscious means of generating electricity while maintaining the economic viability of current electricity infrastructure is not a problem unique to Franklin. Therefore, Franklin cannot seek to remedy the problem with protectionist measures, such as the revisions to the RPS at issue in the present case.

In enacting EDEA, the Franklin legislature made additional findings which elucidate the protectionist purpose even further. The legislature recognized that Franklin has substantial biomass resource potential and by recognizing that potential the State has the opportunity to diversify its economy. The legislature also determined that by developing new electric generating facilities would create opportunities for employment in the energy sector in Franklin. These findings demonstrate that Franklin's EDEA unabashedly seeks to improve the competitive position of Franklin citizens and companies when compared to foreign competitors. The purpose of Section 2(a) goes far beyond simply ensuring the most suitable biomass feedstock is used.

c. Even if the statute is not deemed discriminatory under the previous two theories, it is still discriminatory based on its discriminatory effect

Discrimination may manifest itself in the means as well as the ends of legislation. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626. Therefore, this Court is not bound to the plain language of the law or the purpose pronounced by the Franklin legislature, rather it must determine for itself the statutes practical impact. The method of the statutes application matters when determining if there are protectionist effects. *Westinghouse Corp. v. Tully*, 466 U.S. 388, 398 (1984). The method of the statutes application is clearly set out in the statute itself.

There are several criteria set out for selecting what regions will qualify as biomass growing regions, and therefore which regions will have the exclusive rights to provide the biomass required by the new EDEA. First, it must be within the state of Franklin and the

adjoining states. This was addressed above at length as being facially discriminatory, however if the Court does not agree it will certainly recognize this is the first significant restriction which leads to patently discriminatory effects. Second, the Franklin Department of Natural Resources must recognize the area as containing biomass which is suitable for its required purpose. Finally, the Franklin Division of Commerce must recognize the area as economically depressed. This final requirement necessarily is focused on areas within Franklin.

The two state agencies charged with making this determination under the outlined guidance went to work applying the standards and selected just two forest regions as Designated Biomass Growing Regions. The selected regions make it unmistakably clear that regardless of the language or purpose of the statutory changes, EDEA, Section 2(a) has impermissibly discriminatory effects. The two selected regions are 756 acres of the Franklin-Allegheny State Forest and 422 acres of the Central Appalachian Forest. Two thirds of the Franklin-Allegheny State Forest are within Franklin and the remaining third is in the neighboring Vandalia, while the entirety of the selected acres in the Central Appalachian Forest fall within Franklin.

This Biomass Eligibility Determination Order allowed the state agencies to explain why the two regions were selected. Both explanations focus in part on the unemployment rates of counties within Franklin, with no mention of potential economic depression in counties outside of Franklin. This further clarifies that the effect of the statute through its application is to only certify biomass that is harvested in Franklin or close proximity thereto. Under any of the previously expressed theories of discrimination, the burden must shift to the State of Franklin to satisfy strict scrutiny to maintain its statute constitutionality.

d. The State of Franklin fails to carry its burden to withstand strict scrutiny under the dormant Commerce Clause

To satisfy strict scrutiny with respect to the dormant Commerce Clause, the state defending the law, Franklin, must establish both a legitimate local purpose and that the same purpose could not be achieved by any less discriminatory means. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). The burden of proof lies with the state defending the law in question. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). The purposes provided by Franklin include: (1) preserving the economic viability of existing coal-fired generation, and (2) stimulating the development of a biomass industry to encourage environmentally beneficial action by utility companies. Assuming these purposes are deemed legitimate local goals, this Court should recognize that illegitimate means of isolating the region from the national economy were used to achieve those goals.

Regardless of if this Court determines that the purpose of this statute serves a legitimate local need, it must still find the statute unconstitutional based on the second step of the strict scrutiny analysis. There are nondiscriminatory alternatives that would be equally capable of achieving these local goals. Nothing about either of these two goals makes it necessary for biomass to originate from local sources. The state could preserve the economic viability of its existing coal fired generation and stimulate the environmentally beneficial development of the biomass industry by having an open market for biomass in Franklin. By simply eliminating the regional restrictions on where biomass must originate the statute would still help achieve the State's goals without unnecessarily discriminating against other state's biomass industries.

IV. Section 2(b) of EDEA as enacted by Franklin and administered by Franklin's agencies is invalid under the dormant Commerce Clause

Section 2(b) of EDEA also runs afoul of the dormant Commerce Clause when applying the *Hughes* test as outlined above. The first and most critical step of the analysis is determining

"whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect." *Hughes*, 441 U.S. at 336. This is a factually dependent question and should begin with the language of the statute.

Section 2(b) of the Act modified Franklin's existing RPS to include a "carve-out" for customer-sited CHP or cogeneration facilities fueled by biomass that are connected to the distribution grid of an electric distribution utility serving customers within Franklin. Unlike Section 2(a) discussed above, Section 2(b) does not require the fuel for eligible CHP facilities to be "certified biomass feedstock." Based on the absence of clear discriminatory language within the "carve-out" provision and freedom to purchase any biomass to fuel the eligible CHP facilities, we concede that this section of EDEA is not facially discriminatory.

a. Even if the statute is not facially discriminatory, it is still discriminatory due to its discriminatory purpose and practical effect

It is long established by the Supreme Court of the United States that the powers reserved for the states cannot be used "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G. A. F. Seelig, Inc.*, 249 U.S. 511, 527 (1937); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The aim and effect of Section 2(b) of EDEA is clear, by requiring CHP facilities to be located on the customer side of the meter and be connected to the distribution grid of an electric distribution company serving customers within Franklin means that all eligible CHP facilities must be located exclusively within the state of Franklin.

In *Dean Milk Co. v. City of Madison*, the Supreme Court addressed a regulation, which similarly to the one at issue in this case did not facially discriminate against out-of-state interests. *See*, 340 U.S. 349. The ordinance in *Dean Milk Co.* prohibited the sale of milk that was not

processed and bottled at an approved facility within a five-mile radius of the city's center. *Id.* Due to the discriminatory effect of the ordinance that Court applied strict scrutiny to the ordinance and the same standard should be applied to Section 2(b) of Franklin's EDEA.

b. The State of Franklin fails to carry its burden to withstand strict scrutiny under the dormant Commerce Clause

When challenged, a regulation that is determined to be discriminatory must be subjected to strict scrutiny. These regulations are virtually *per se* unconstitutional unless the State defending the law can establish both a legitimate local purpose and that the same purpose could not be achieved by any less discriminatory means. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988). The burden of proof under strict scrutiny lies with the state defending the law in question. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977).

In attempting to carry that burden Franklin will put forth multiple local goals which this Court should scrutinize to determine their validity. Section 2(b) incentivizes the development of distributed energy resources within Franklin to help stabilize power prices and create employment opportunities in the energy sector in Franklin. Additionally, Franklin contends that the CHP geographic limitations are in place to capture unique benefits of customer-sited generation, such as improved resilience of the electric utility grid, reduced transmission and distribution costs, and increasing ability of customers to manage their energy costs. The combination of these local purposes will likely rise to the level necessary to establish the first prong of the strict scrutiny analysis.

However, after analyzing these local purposes this Court should recognize that they could be effectuated through less discriminatory means. The energy capacity and power prices could be stabilized without the local component of the regulation which requires the CHP's to be customer-sited. Franklin could have stated these purposes and allowed companies to compete

for the rights to provide the generation capacity based on their ability to demonstrate the positive effects of allowing them to operate and provide energy for Franklin. This would allow the market to recognize any unique benefits within the environmental parameters set through the legislation. Allowing Franklin's regulation survive, as is, to protect the industry within its borders equates to the exact economic Balkanization the framers of our Constitution attempted to mitigate through the enactment of the Commerce Clause. *Hughes*, 441 U.S. at 325. Section 2(b) does not withstand strict scrutiny and should be invalidated as being constitutionally deficient under the dormant Commerce Clause.

Conclusion

This Court should affirm the District Court's decision to invalidate Section 1 of the EDEA because the regulation is both field and conflict-preempted under the Supremacy Clause of the U.S. Constitution. Additionally, it should affirm the District Court's decision to invalidate Section 2(a) and (b) of the EDEA because both sections run afoul of the U.S. Constitutions well established dormant Commerce Clause.

Certificate of Service

Pursuant to Official Rule IV, Team Members representing Electricity 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. 4