IN THE

# UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

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| State of FRANKLIN,<br><br>*Appellant*,<br><br>v.<br><br>ELECTRICITY PRODUCERS COALITION,<br><br>*Appellee*. | ) | Case No. 16-01234 |

*ON APPEAL*
*FROM THE UNITED STATES DISTRICT COURT*
*FOR THE EASTERN DISTRICT OF FRANKLIN*

## BRIEF FOR THE APPELLEE

*Team* 12
Counsel for the Appellee

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## JURISDICTIONAL STATEMENT

Federal courts have jurisdiction over the subject matter of this case under 28 U.S.C. §1331 because the claims arise under federal law, particularly under the Supremacy Clause of Article IV, Section 2 and the Commerce Clause of Article I, Section 8 of the United States Constitution. (J.A. at 12). After the EPC filed its claim with the Federal District Court for the Eastern District of Franklin on July 1, 2016, the court granted a final order in support of EPC's motion for summary judgement on November 7, 2016. *Id*. Following this decision, Franklin appealed the case to the Twelfth Circuit Court of Appeals where it is to decide on the merits of challenges to EDEA Section 1 under the Supremacy Clause and challenges to EDEA Section 2 under the dormant Commerce Clause. *Id*. at 13

## STATEMENT OF ISSUES PRESENTED

I. Whether Section 1 of 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.

II. 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.

III. 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.

IV. 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

This case is disputed between the State of Franklin, Appellant, and Electric Producers Coalition (EPC), Respondent, the national trade association representing electric power suppliers. (J.A. at 12). EPC is incorporated under the laws of the District of Columbia and its membership consists of companies that are involved in wholesale and retail electricity markets with significant financial investments in Franklin and throughout the PJM operating region. *Id.*

EPC originally commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin. *Id.* In this action, EPC sought a declaratory judgement that (1)

the CAP program violates the Supremacy Clause of the United States Constitution considering FERC's sole control over "the scale of electric energy at wholesale in interstate commerce," and (2) the modifications to Franklin's RPS violate the dormant Commerce Clause of the United States Constitution due to their disparate impact on interstate commerce. *Id*. Additionally, the EPC sought injunctive relief to prevent the EDEA from being implemented until the dispute was resolved. *Id*. Shortly after the action began, EPC and Franklin filed cross-motions for summary judgement. *Id*. The District Court, issuing its decision on November 7, 2016, granted EPC's motion for summary judgement, finding that: (1) Section 1 of the EDEA is "field preempted" under the Supremacy Clause because the CAP program interferes with wholesale power markets, (2) Section 1 of the EDEA is "conflict preempted" because FERC has already determined that market-based processes approved and overseen by FERC are the best way to being more efficient and inexpensive power to electricity customers in the United States, (3) Section 2(a) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "certified biomass feedstock" is limited to areas primarily located within the state of Franklin and discriminates against biomass produced outside of the state of Franklin, thus burdening interstate commerce and (4) Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "eligible facilities" excludes the participation of energy providers outside the state of Franklin and the state has proven no basis to justify this burden on interstate commerce. *Id*. The District Court did not discuss dormant Commerce Clause claims asserted by EPC with respect to Section 1 of the EDEA and they have dropped this claim as a result. *Id*. at 12-14.

In its appeal to the Twelfth Circuit Court of Appeals, Appellant claims that its CAP program does not violate the Supremacy Clause because (1) it is not preempted under the

Federal Power Act, (2) it operates completely and independently from PJM's capacity auction process, and (3) it merely provides supplemental payments to a narrowly defined group of generators, (4) it does not have the effect of settling wholesale capacity prices and (5) it does not interfere with the operation and competitive market forces intended to be covered under FERC's regulatory scheme. *Id*. at 13. Appellant further argues that its RPS modifications do not violate the dormant Commerce Clause because (1) state action to encourage environmentally beneficial action does not fall within proscribed actions under the dormant Commerce Clause, (2) any geographic limitation associated with "certified biomass feedstock" is not defined according to state borders, but rather is tied to factors geared toward the suitability of the feedstock for co-firing with coal in power plants, (3) promoting generation resources does not violate the Commerce Clause, and (4) the provision is intended to capture the unique benefits of customer-sited generation and increasing the ability for customers to manage their energy costs, not to discriminate against out-of-state renewable resources. *Id* at 14.

## STATEMENT OF THE FACTS

In response to diminishing employment rates brought on by a suffering energy sector, the State of Franklin enacted the Energy Diversification and Expansion Act ("EDEA" or "the Act") in January 2016. (J.A. at 3). The EDEA was passed with the goal of preserving the economic viability of the existing coal-fired generating plants and stimulating the development of a biomass industry as a way to stimulate the Franklin energy sector and job creation. *Id*.

At the time of EDEA's enactment, Franklin derived 82 percent of its electricity generation from coal, 10 percent from natural gas, 5 percent from wind, 2 percent from biomass, and 1 percent from solar photovoltaic ("PV"). *Id*. Although Franklin is the third-largest coal

producing state in the country, behind Wyoming and West Virginia, Franklin experienced dramatic declines in coal production in the lead up to the EDEA's passage due to the availability of cheaper natural gas alternatives and declining prices of renewable resources increasingly being integrated by electric utilities into their generating portfolios. *Id*. Compounding the issue of these market forces were stringent environmental regulations installed by the U.S. Environmental Protection Agency in recent years, making energy production even more costly for Franklin business. *Id*.

Given the threat of power plants closing in response to market and regulatory forces, Franklin stood to potentially lose several key benefits generated by its energy sector, including (1) continued production of coal within Franklin to meet the plants' fuel supply needs, (2) preservation of the associated coal severance tax revenue to Franklin's state budget, (3) continued employment of coal miners within Franklin (and the indirect economic benefits flowing therefrom), and (4) the property tax revenues flowing to the communities in which the plants were located. *Id*. Additional externalities from loss of generating capacity for the region included a threatened reliability of the electric generating system and inability to attract and retain industrial and manufacturing jobs in Franklin. *Id*.

In addition to Franklin's coal resources, Franklin is the third most forested state in the country with 77 percent of the state topography covered in forests. *Id*. Studies from Franklin State University reveal that residues from harvesting forest products provide sufficient feedstock to support a biomass industry. *Id*. This would be accomplished both for co-firing with coal at electric plants and for biomass-fired small power production facilities. *Id*.

With the objective of promoting its coal and biomass industries, Franklin passed the EDEA with the following three elements: (1) providing Carbon Assistance Payments (CAP)

financial incentives for coal-fired plants serving Franklin, (2) modifying its existing Renewable Portfolio Standard (RPS) to require that electric companies generate power with no less than 15 percent deriving from "certified biomass feedstock," and (3) modifying its existing RPS to include a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass. *Id*. at 3-4.

Franklin's current RPS requires eligible companies to secure 20 percent of the electricity sold to retail customers within Franklin from renewable sources by 2020, with that percentage increasing to 30 percent by 2030. *Id*. at 8. Renewable energy resources eligible to this provision include solar, wind, geothermal, biomass, and small-scale or run-of-river hydro. *Id*. However, the two modifications (2) and (3) of the EDEA supply new requirements.

Under the first modification of point (2), Franklin requires that electric companies generate no less than 15 percent deriving from "certified biomass feedstock." *Id*. "Certified biomass feedstock" is defined as feedstock identified by relevant Franklin agencies as a "Designated Biomass Growing Region" under Section 2(a)(3) of the EDEA. *Id*. This eligible region is defined further under Section 2(a)(4) of the EDEA as "An area within the state of Franklin and the adjoining states thereto that has been identified by (1) the Franklin Department of Natural Resources (DNR) as containing biomass suitable for sustainable harvest and (2) the Franklin Division of Commerce as an economically depressed area." *Id*. at 9. The EDEA reports from these two reports found two Designated Biomass Eligibility Growing Regions: (1) Franklin-Alleghany State Forest, which includes 506 acres within Franklin and 256 acres within Vandalia in addition to holding unemployment rates up to 12.3 percent and (2) the Central Appalachian Forest, which includes 422 acres within Franklin in addition to holding unemployment rates of up to 14.6 percent. *Id*.

Adding to point (2), the second modification under point (3) concerns a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass. *Id*. at 10. The effect of this carve-out is that CHP facilities are not required to use fuel that is "certified biomass feedstock." *Id*. Because these CHP facilities are required 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, CHP facilities by definition are located exclusively within the state of Franklin. *Id*.

In addition to the specific EDEA provisions, the preamble to the EDEA asserts the following findings and declarations: (1) the mid-Atlantic regions has suffered significant loss in electric generating capacity, (2) the PJM Interconnection lacks authority to order new generation, (3) PJM has not offered necessary incentives to encourage development of new generation, (4) the public interest is served with economic development and reasonable electric prices, (5) biomass investments reduce greenhouse gas emissions and promote a clean environment, (6) diversifying the economy with various energy sources provides reliability and sustainability, (7) distributed energy resources (DERs) stabilize energy prices and reduce costs to consumers, and (8) DER's reduce the environmental impact of the energy industry and promote economic growth. *Id*. at 4-5.

The Governor of the State of Franklin issued a signing statement upon the enactment of the EDEA, which referred to several economic benefits flowing from the Act. *Id*. at 5. Such benefits included: (1) serving as a "necessary and vital support" for the coal miners in Franklin, "our state's most important industry," (2) the "opportunity to diversify the state's energy economy by tapping into Franklin's biomass resource potential," and (3) creating new jobs in the "energy industry of the future" by stimulating growth of these diversified energy resources. *Id*.

Pursuant to the Electric Customer Choice and Competition Act of 1996 (ECCCA), the State of Franklin restructured its electricity markets to increase competition by use of bilateral contracts or competitive wholesale markets administered by Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs"). *Id*. RTOs and ISO's are independent, non-profit entities regulated by the Federal Energy Regulatory Commission (FERC). *Id*. The State of Franklin is located within the region served by the PJM Interconnection, the ISO serving all or parts of 13 mid-Atlantic and Midwestern states as well as the District of Columbia. *Id*. The PJM is divided into 21 locational marginal pricing zones (LPM), which act as "sub-markets" within the PJM region that reflect the relative generation capacity (supply) and loads (demand) within a particular geographic area. *Id*. at 5-6. Three of these LPM zones are located within all or portions of the state of Franklin: (1) Franklin East, which is entirely within the state of Franklin, (2) Vandalia South, about one-quarter located within Franklin and the remainder within the border state of Vandalia, and (3) Allegheny North, about one-third located within Franklin and remainder within the border state of Allegheny. *Id*. at 6.

These three LPM zones are of particular importance to beneficiaries of the CAP program. Under Section 1(a)(6) of EDEA, a coal-fired generating plant is only eligible for CAP benefits if it (1) is located within the Franklin East, Vandalia South, or Allegheny North zones within the PJM operating region, (2) relies on coal as its primary fuel source, at least ten percent of which originates from coal mines located in whole or in part within the state of Franklin, and (3) has been determined by the Commission to require financial assistance to sustain its continued operations, based on the Commission's analysis and findings with respect to such plant's projected energy, capacity and ancillary service revenues and projected fuel and operating and

maintenance (O&M) costs. *Id*. If the commission determines that a generating plant is eligible, it is offered a ten-year contract administered by the Franklin State Energy Office ("SEO") to receive CAPs. *Id*. at 7.

Following these guidelines, the effect of the policy in practice is reported in the EDEA Implementation Order from June 2016. *Id*. This report identified five eligible coal-fired generating plants, three of the plants are located within the Franklin East zone, one in the Vandalia South zone (but located outside the state of Franklin), and one in the Allegheny North zone (and within the state of Franklin). *Id*. These plants subsequently received a CAP benefit of $18.50 per MWh and the program would commence on September 1, 2016. *Id*.

Ultimately, these five companies have exclusive privileges to these benefits and no other company outside the region is eligible for the programs under the EDEA.

## STATEMENT OF THE ARGUMENT

Respondent, Electricity Producers Coalition (EPC) respectfully requests that the United States Court of Appeals for the Twelfth Circuit upholds the decision of the United States District Court for the Eastern District of Franklin. EPC supports the District Court in its holding that (1) Appellant's CAP program is invalid under the Supremacy Clause and (2) Appellant's RPS program is invalid under the dormant Commerce Clause.

Consequently, because there is no authority greater than the United States Constitution., (1) Section 1 of the EDEA is "field preempted" under the Supremacy Clause of the U.S. Constitution. The Supremacy Clause gives Congress with the authority to comprehensively regulate an entire field or market. Therefore, states are preempted from enacting any laws, which supplement or contradict the supremacy of the federal government. Because Congress has

delegated exclusive authority to the Federal Energy Regulatory Commission to regulate wholesale electric rates in interstate commerce, Section 1 of the EDEA is in direct violation of federal jurisdiction. (2) Section 1 of the EDEA is also "conflict preempted" under the Supremacy Clause because it stands in direct opposition to the Federal Powers Act, which delegates the exclusive authority to manage and establish wholesale market prices for electricity rates to the Federal Energy Regulatory Commission. If EDEA Section 1is implemented, it would be impossible for the federal government to maintain objective control to maintain the balance of supply and demand needed for rate prices. (3) Section 2(a) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "certified biomass feedstock" is limited to areas primarily located within the state of Franklin and discriminates against biomass produced outside of the state of Franklin and (4) Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "eligible facilities" excludes the participation of energy providers outside the state of Franklin. Appellant has also failed to prove any basis that justifies these burden on interstate commerce. Therefore, the EDEA is invalid under the Supremacy Clause and the dormant Commerce Clause.

## ARGUMENT

### I. SECTION 1 OF THE STATE OF FRANKLIN'S ENERGY DIVERSIFICATION AND EXPANSION ACT (EDEA) IS "FIELD PREEMPTED" UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

Section 1 of the EDEA directly violates Article VI, Clause 2 of the U.S. Constitution, the Supremacy Clause. The Supremacy Clause establishes that the federal government, by the Constitution and all federal laws and treaties made under its authority, represents "the Supreme law of the land." U.S. Const. art. VI, Cl. 2. In accordance with the principle of federal

supremacy, state laws which are in opposition with the laws and intent of the federal government may be deemed preempted and invalidated. *Hillsborough Cnty., Fla. v. Auto. Med. Labs*, 105 S.Ct. 2371 (1985). The preemption of state action may occur through use of a Constitutional provision, act of law, and/or regulations mandated by a federal agency. *PPL Energyplus, LLC v. Nazarian*, 974 F.Supp.2d 790 (D.Md. 2013) (*citing City of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 168–69 (4th Cir.2002)).

Under the Supremacy Clause, Congress has the authority to wholly regulate an entire field or market. *N.W. Cent. Pipeline Corp. v. State Corp. Com'n of Kansas*, 109 S.Ct. 1262 (1989). Therefore, the federal government may preempt a state from supplementing or contradicting federal laws by enacting legislation which demonstrates the federal government's intent to fully regulate and manage a field. *Transmission Agency of California v. Sierra Pacific Power Co*., 295 F.3d 918, 928 (9th Cir. 2002). Field preemption arises when a federal statutory system is amply comprehensive to reasonably infer that Congress has provided no area for any supplementary state regulation. *Public Util., Grays Harbor, WA*, 379 F.3d at 642. The Supreme Court also explained in *Rice v. Santa Fe Elevator Corp.*, that field preemption also can be inferred by acts of Congress which touches a field where the federal interest is so dominant that the federal system will be assumed to preclude any state law on the subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

The passage of the Federal Powers Act (FPA) demonstrated Congress' direct intent for wholesale electric markets to be managed exclusively under federal authority. *Id.* Because Congress, by act of law, mandates that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over interstate wholesale rates, any state law which falls within the jurisdiction of FERC is preempted. *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898,

902 (4th Cir.1987). Therefore, Section 1 of the EDEA directly violates the Supremacy Clause of the United States through the CAP program, because it interferes with wholesale power markets and pricing, which FERC has exclusive jurisdiction to regulate. Consequently, this Court should uphold the decision of Eastern District of Franklin. The Appellant should be preempted from enacting any laws which attempt to supersede the dominant and Constitutionally protected interest of the federal government. *English v. Gen. Elec. Co.*, 796 U.S. 72, 79 (1990).

### A. Congress intended FERC to exclusive jurisdiction under the Federal Powers Act over the sale of electric energy and the sale of capacity at wholesale in interstate commerce.

The ratification of the FPA grants FERC the exclusive authority to regulate the transmission and sale of electric energy at wholesale in interstate commerce. *Public Util., Grays Harbor, WA v. IDACORP, Inc.*, 379 F.3d 641, 642 (9th Cir. 2004). Because Congress has granted FERC complete regulatory authority over electricity wholesale markets and commerce, any state actor is thus field preempted from passing any legislation granting authority to manage or control whole electric energy commerce. *N.W. Cent. Pipeline Corp.* 109 S.Ct. 1262 (1989).

Numerous sources of case law confirm FERC's exclusive power to regulate the wholesale electricity energy market in interstate commerce. The Forth Circuit in *Appalachian Power Co. v. Public Service Com'n of West Virginia* concluded that FERC's authority under the FPA gives it the undisputed exclusive jurisdiction to regulate the facilities used for the transmission of sales of interstate energy, which includes rates and charges made, which are received or demanded by public utilities for the sale of electric energy. *Appalachian Power Co.*, 812 F.2d at 898. Additionally, Justice Scalia noted in his opinion *in Miss. Power & Light Co.*, that FERC has exclusive authority over wholesale electricity sales, which cannot be supplemented by the state

governments, asserting that "it is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject. *Miss. Power & Light Co.v. Miss. Ex rel. Moore*, 108 S.Ct. 2428, 2442 (1988).

By issuing the EDEA, the Appellant acted to usurp FERC's jurisdiction to regulate electricity facilities used for the sale of interstate electric energy at wholesale. The State of Franklin, via its Public Service Commission (PSC) aims to provide financial incentives in the form of CAPs to coal-fired generating plants. As provided by Supremacy Clause of the Constitution and subsequent laws giving exclusive jurisdiction to FERC to manage the sale of electric energy and the sale of capacity at wholesale in interstate commerce, the Appellant is not legally permitted to regulate or influence the electricity wholesale markets. Even in cases where state governments attempt to stimulate their economy by providing economic incentives for electric production, the Supreme Court has consistently held that FERC has the exclusive authority to regulate wholesale electricity markets, and set just and reasonable wholesale rates without influence from the States. *Utilimax.com v. PPL Energy Plus, LLC*, 378 F.3d 303, 305 (3d Cir.2004). Therefore, Section 1 of Franklin's EDEA violates federal law granting sale of electric energy and the sale of capacity at wholesale in interstate commerce to FERC.

### B. Franklin's Carbon Assistance Payment program interferes with wholesale power markets, effectively setting a higher above-market price for electricity sold by the subsidized generators.

FERC has exclusive jurisdiction over the wholesale electricity power markets as well as the rates charged to interstate wholesale electricity consumers. *Nantahala Power and Light Co. v. Thornburg*, 460 U.S. 953, 956 (1986). The court has held that once a rate has been set by FERC, states may not independently conclude that the wholesale rates are unreasonable. *Id.* States are required to adhere to Congress' Constitutionally protected authority to provide FERC with the

exclusive control over the wholesale rates of interstate electricity. *Id*. Thus, states cannot interfere with FERC jurisdictional authority for electricity rates. *Id.*

The Appellant argues that its CAP program does not interfere with FERC's authority to regulate interstate wholesale electric rates, but serves to preserve the economic viability of the state's existing coal-fired generating plants that have suffered in the economic downturn, which the state has endured over the past few years. (J.A. at 3). Additionally, the Appellant contends the CAP program will assist the state in stabilizing the price of electricity throughout the state and creating employment opportunities for families who rely on the mining of coal as their primary and oftentimes, exclusive source of income opportunity within the state. (J.A. at 4).

While the Appellant's aims in assisting the development of its economy may indeed be noble, supplementing coal-fired plants located within the state through the CAP program effectually establishes an intrastate wholesale rate for electricity production. This action violates Congress' delegation of wholesale regulatory authority to FERC. The FPA provides that FERC holds the sole and exclusive jurisdiction over wholesale rates and acts as the only authority which can determine a market price for wholesale electricity based on factors of supply and demand. 16 U.S.C.A. § 824d. Once a rate has been set by FERC, a state may not determine that FERC-approved wholesale rates are unreasonable. *Nantahala Power and Light Co.*, 460 U.S. at 956. Instead, states must give FERC complete authority over interstate wholesale rates. *Id.*

The Supreme Court in *Hughes v. Talen Energy Marketing, LLC* held that states may not seek to achieve ends, however legitimate to intrude over FERC's authority to oversee interstate wholesale rates. *Hughes v. Talen Energy Marketing, LLC.*, 136 S.Ct. 1288 (2016). In the instant case, similar to that in *Hughes* and *Nantahala Power & Light Co.*, the Appellant determined that the wholesale rate was not sufficient enough to ensure that the coal-fired generating plants will

continue operation without State interference. *Id.* The Supreme Court noted that a state cannot act in areas outside of its jurisdiction, even to improve its state economic outlook. *Id.* Such interference with the wholesale rate not only unfairly prompts the state to an economic advantage over others in its PJM region, it also inorganically alters the market rate price of wholesale electricity in interstate commerce. *Id.*

Consequently, the CAP program inorganically affects the supply and demand of wholesale electricity by setting a higher above-market price for electricity sold by the subsidized generators, in violation of federal law. FERC is the sole agency with the ability to control or influence the market price of wholesale electricity. As noted in *Nantahala Power and Light Co*., even if the state disagrees with the market price set by FERC, it must respect the rate price and not act to interfere with the FERC's exclusive authority. Therefore, the Appellant acted outside its Constitutional bounds by enacting EDEA, Section 1.

## II. SECTION 1 OF THE STATE OF FRANKLIN'S ENERGY DIVERSIFICATION AND EXPANSION ACT IS "CONFLICT PREEMPTED" UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

A state may be conflict preempted in cases where there is an actual conflict between federal and state law, in which compliance with both laws are impossible. *Pac. Gas & Elec. Co. v. St. Energy Resources Conserv.*, 461 U.S. at 204 (1983). Conflict preemption occurs in cases where a state law stands in direct opposition to the accomplishment and execution of a federal statute. *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288 (2000). In cases where a state law is conflict preempted by a federal law, the court must look at the entirety of the state statute and determine if the purpose of the federal law cannot be otherwise effectively accomplished due to interference by the state. *Id.* The Court does not balance the conflicting state and federal

interests, but instead defers to the Supremacy Clause of the Constitution, noting that any state law that infers with federal authority must yield. *Felder v. Casey*, 487 U.S. 131, 138 (1988).

Section 1 of Franklin's EDEA acts to influence the market-price of electric rates by selectively providing payments to coal-fired electricity generators within the state of Franklin. The EDEA itself directly conflicts with the FPA which deems that the federal government has the sole authority to manage and set rates for wholesale electricity producers. *Rice.*, 331 U.S. at 230. The Eastern District of Franklin correctly noted that FERC, agency which the federal government exclusively charged with administering market processes comprised the best and solely legal method to provide efficient lower cost electricity to all customers within the PJM and throughout the United States. (J.A. at 13). Because the State of Franklin is standing as direct obstacle for FERC to administer efficient and effective market prices throughout the PJM service region, the Appellee should therefore be conflict preempted from implementing Section 1 of the EDEA as provided by the Supremacy Clause of the U.S. Constitution.

### A. The Carbon Assistance Payments program would interfere with market signals, intended to be provided by the competitive energy market process

The implementation of the CAP program will effectually interfere with the market signals that are intended by FERC to ensure a competitive auction for market prices within the PJM. States are not legally permitted to ensue actions to establish a rate price that is not provided by FERC. *Transmission Agency, North. Cal. v. Sierra Pacific*, 295 F.3d 918 (9th Cir. 2002). Therefore, states or localities cannot implement actions to disrupt federally regulated competition in the electric energy market. The CAP program will artificially lower the price of electricity produced within the state of Franklin and disrupt the existing market signals in the PJM. The

consequence of such action may destabilize the electricity industry and negatively harm other states and districts, which are members of the PJM.

## III. SECTION 2 OF THE EDEA IS INVALID UNDER THE DORMANT COMMERCE CLAUSE BECAUSE THE GEOGRAPHIC LIMITATIONS OF "CERTIFIED BIOMASS FEEDSTOCK" AND "ELIGIBLE FACILITIES" FAVORS COMPANIES WITHIN THE STATE OF FRANKLIN TO THE DETRIMENT OF COMPANIES LOCATED OUTSIDE THE STATE OF FRANKLIN.

The Commerce Clause, under Article I, Section 8 of the Constitution, provides Congress with the power to "regulate commerce with foreign commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. From this power, Courts have inferred a negative power over states known as the "dormant Commerce Clause," which has been interpreted "even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

Justification for this power is expressed in Federalist 22 by Alexander Hamilton, where he compares the trading inefficiencies of the Germanic states to those of America. "The commerce of the German empire is…rendered almost useless…from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." Alexander Hamilton, Federalist Paper 22, Dec. 14, 1787, The Federalist: Alexander Hamilton, James Madison, and John Jay, Robert A. Ferguson (New York Barnes and Noble, 2005), 111. Hamilton emphasizes the importance of a national economy, predicated upon national unity and cohesion. Permitting states to hedge their positions against others with unfavorable treatment to any entity outside the state undermines very fabric of a national economy.

The Supreme Court has identified three broad categories of activity that Congress may regulate pursuant to the Commerce Clause where the dormant Commerce Clause will apply: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). If it is determined that a case falls within the scope of the dormant Commerce Clause, as it does in this case, a state statute may be invalid under the dormant Commerce Clause for one of several reasons.

First, a statute that clearly discriminates against interstate commerce in favor of intrastate commerce is "virtually invalid per se, and can survive only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 108, 112 (2d Cir.2001); see also *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992). This is in essence a disparate treatment standard for state laws that facially discriminate against actors operating outside of their particular state. As the Supreme Court held in *Granholm v. Heald*, laws that expressly mandate differential treatment of competing economic interests between in-state and out-of-state entities in a way that benefits the former and burdens that latter are considered facially discriminatory, and courts subject them to strict scrutiny review. *Granholm v. Heald*, 544 U.S. 460, 472 (2005); see also *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). This exacting standard requires a State to demonstrate that (1) the law has a non-protectionist purpose and (2) that there is no less discriminatory means for achieving that purpose.

Second, even if the statute does not rise to the level of "clear discrimination, it will nevertheless be invalidated under the "Pike balancing test" if it "imposes a burden on interstate commerce incommensurate with the local benefits secured." *Nat'l Elec. Mfrs.*, 272 F.3d at 108

(citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Consequently, the Pike balancing test applies to disparate impact cases. Under the Pike balancing test, Appellant must show that a statute enacted for a legitimate public purpose, although facially equal, actually imposes "'burdens on interstate commerce that exceed the burdens on intrastate commerce,'" *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59, 75 (1998) (quoting *Gary D. Peake Excavating Inc. v. Town Bd. of Hancock*, 93 F.3d 68, 75 (2d Cir.1996)), and that those excess burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Third, a statute will be invalid per se if it has the practical effect of "extraterritorial" control of commerce occurring entirely outside the boundaries of the state in question. *See Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989). Determining the "extraterritorial control" of commerce from a state policy, courts analyze several potential elements. First, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and, specifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states." *Id*. at 336. Second, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id*. Third, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar

legislation." *Id*. at 337. To this point, the extraterritorial effect must amount to more than the upstream pricing impact of a state regulation, and "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

Ultimately, the abbreviated test for dormant Commerce Clause cases consists of three elements: "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect, (2) whether the statute serves a legitimate local purpose, and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Additionally, the burden to show discrimination rests on the party challenging the validity of the statute, but "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

Under this framework, (1) Section 2(a) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "certified biomass feedstock" is limited to areas primarily located within the state of Franklin and discriminates against biomass produced outside of the state of Franklin, and (2) Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "eligible facilities" excludes the participation of energy providers outside the state of Franklin. Franklin has also failed to prove any basis that justifies this burden on interstate commerce. Therefore, the EDEA is invalid under the dormant Commerce Clause.

### A. Section 2(a) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "certified biomass feedstock" is limited to areas primarily located within the state of Franklin and discriminates against biomass produced outside of the state of Franklin.

Section 2(a) is the first of two modifications to Appellant's existing Renewable Portfolio Standard (RPS). Effectively, Section 2(a) of the EDEA limits beneficiaries of "certified biomass feedstock" to areas primarily located within the state of Franklin and discriminates against biomass produced outside of the state of Franklin.

Under this modification, Appellant requires that electric companies generate no less than 15 percent deriving from "certified biomass feedstock." *Id.* at 8. "Certified biomass feedstock" is defined as feedstock identified by relevant Franklin agencies as a "Designated Biomass Growing Region" under Section 2(a)(3) of the EDEA. *Id.* This eligible region is defined further under Section 2(a)(4) of the EDEA as "An area within the state of Franklin and the adjoining states thereto that has been identified by (1) the Franklin Department of Natural Resources (DNR) as containing biomass suitable for sustainable harvest and (2) the Franklin Division of Commerce as an economically depressed area." *Id.* at 9. The EDEA reports from these two reports found two Designated Biomass Eligibility Growing Regions: (1) Franklin-Alleghany State Forest, which includes 506 acres within Franklin and 256 acres within Vandalia in addition to holding unemployment rates up to 12.3 percent and (2) the Central Appalachian Forest, which includes 422 acres within Franklin in addition to holding unemployment rates of up to 14.6 percent. *Id.*

In addition to the first modification, a second modification concerns a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass. *Id.* at 10. The effect of this carve-out is that CHP facilities are not required to use fuel that is "certified biomass feedstock." *Id.* Because these CHP facilities are required 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, CHP facilities by definition are located exclusively within the state of Franklin. *Id*.

In addition to the specific EDEA provisions, the preamble to the EDEA asserts the following findings and declarations: (1) the mid-Atlantic regions has suffered significant loss in electric generating capacity, (2) the PJM Interconnection lacks authority to order new generation, (3) PJM has not offered necessary incentives to encourage development of new generation, (4) the public interest is served with economic development and reasonable electric prices, (5) biomass investments reduce greenhouse gas emissions and promote a clean environment, (6) diversifying the economy with various energy sources provides reliability and sustainability, (7) distributed energy resources (DERs) stabilize energy prices and reduce costs to consumers, and (8) DER's reduce the environmental impact of the energy industry and promote economic growth. *Id*. at 4-5.

In addition to these explicit legislative provisions, Franklin Governor Emmanuel ("Manny") Carbon issued a signing statement upon its enactment, which referred to several economic benefits flowing from the Act. *Id*. at 5. These included: (1) serving as a "necessary and vital support" for the coal miners in Franklin, "our state's most important industry," (2) the "opportunity to diversify the state's energy economy by tapping into Franklin's biomass resource potential," and (3) creating new jobs in the "energy industry of the future" by stimulating growth of these diversified energy resources. *Id*.

### B. Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because the geographic limitation of "eligible facilities" excludes the participation of energy providers outside the state of Franklin.

Section 2(b) of the EDEA limits "eligible facilities" of beneficiary status for EDEA incentives to customer-sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin. In addition to the "certified biomass feedstock" RPS modification under Section 2(a), Section 2(b) modification concerns a carve-out for "eligible facilities" being constrained to customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass. J.A. at 10. The effect of this carve-out is that CHP facilities are not required to use fuel that is "certified biomass feedstock." *Id*. Because these CHP facilities are required 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, CHP facilities by definition are located exclusively within the state of Franklin. *Id*.

In addition to the specific EDEA provisions, the preamble to the EDEA as well as the signing statements that illustrated protectionist purpose for Section 2(a) remain applicable for Section 2(b). *Supra* at 17. Unlike Section 2(a), which is arguably invalid for facial discrimination of companies not located in Franklin or limited adjoining states, Section 2(b) is not guilty of disparate treatment. However, although this does not facially exclude companies located outside Franklin from benefiting from the EDEA, the design of Section 2(b) by its very nature excludes the participation of energy providers not located within Franklin in that the sole potential beneficiaries are exclusively located within the state of Franklin.

In a case concerning multi-state milk distributors, the Supreme Court held that, "The mere fact of non-residence should not foreclose a producer in one State from access to markets in other States." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to

avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes*, 441 U.S. at 325-26 (1979).

Through this lens, although "clear discrimination" or "extraterritorial" tests are not applicable, a "Pike balancing test" for disparate impact is appropriate. Appellant contends that the intent of Section 2(b) is to capture the unique benefits of customer-sited generation and increasing the ability for customers to manage their energy costs, not to discriminate against out-of-state renewable resources. J.A. at 14. Nonetheless, this is a disparate impact, not disparate treatment test, so the state's intent is obsolete during this analysis.

In a Pike balancing test, state action is invalid under the dormant Commerce Clause if it "imposes a burden on interstate commerce incommensurate with the local benefits secured." *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d at 108 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Subsequently, Appellant must show that a statute enacted for a legitimate public purpose, although facially equal, actually imposes "'burdens on interstate commerce that exceed the burdens on intrastate commerce,'" *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59, 75 (1998) (quoting *Gary D. Peake Excavating Inc. v. Town Bd. of Hancock*, 93 F.3d 68, 75 (2d Cir.1996)), and that those excess burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

There are several reasons why Section 2(b) should fail a Pike test. First, the added benefit to Franklin customers, as Appellant claims, is questionable. Much of Appellant's justification for Section 2(b) relies on the idea of capturing the unique benefits of customer-sited generation and increasing the ability for customers to manage their energy costs, not to discriminate against out-

of-state renewable resources. J.A. at 14. However, reducing the number of potential energy providers retracts, not expands, customer choice that is paramount to managing energy costs. Reducing competition to a limited list of "eligible facilities" creates a de facto monopoly and limits customers in their ability to find better energy alternatives that fit their unique interests. This was the same concern raised in a recent 4th Circuit case concerning restrictions on healthcare options. There, the court invalidated a certificate-of-need program because "[r]estricting market entry" not only fails to expand service availability, but also "does nothing to [e]nsure that services are provided at reasonable prices." *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 546 (2013) (quoting *Medigen of Ky., Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir.1993)).

Aside from questioning the actual benefit derived from limiting competition, the potential drawbacks remain even if the policy successfully helps Franklin customers. Like the "certified biomass feedstock" restrictions in the Section 2(a) modifications, Section 2(b) also threatens to have a severe impact on interstate commerce. Although local benefits in Franklin as a result of the modifications are expected to include economic development, stable and affordable energy prices, and environmental benefits, the threat of states implementing protectionist policy surrounding energy, the lifeblood of our economy, potentially imposes a detrimental burden to interstate commerce. By limiting energy providers to those only located within a respective state, the chance of those providers raising prices in response to reduced competition is likely. Energy costs have a significant impact on the market price of most sectors. Whether it is powering factory machines, running restaurant ovens, or heating classrooms, energy prices prevail as one of the most pervasive cost-determinants in our economy. The consequence of states moving away from a national, cooperative, and competitive energy structure toward a state-centered,

protectionist, and monopolistic model could be detrimental to our economy. Therefore, Section 2(b) is invalid under the dormant Commerce Clause after a Pike balancing test demonstrates that whatever limited benefit received by Appellant could amount to catastrophic repercussions for our national economy.

### C. Appellant has failed to prove any basis that justifies either burden on interstate commerce and has not met its burden of proving the local benefits derived from its plan nor the unavailability of nondiscriminatory alternatives.

Finally, it is worth noting that Franklin has failed to prove any basis that justifies either burden on interstate commerce under Section 2(a) and Section 2(b). Given the textual language of the EDEA in addition to the signing statements made by Governor Carbon, Appellant has failed to satisfy its burden of both proving the local benefits inherent to the program and the unavailability of nondiscriminatory alternatives. This is critical because although the burden to show discrimination rests on the party challenging the validity of the statute, "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

Not only has Appellant put forward speculative and unstable benefits of the modifications, but it has not explored at all the possibility of less discriminatory alternatives being able to satisfy economic development, stable energy costs to consumers, and environmental initiatives. Presumably, less discriminatory policies than those that place stringent geographic limits on "certified biomass feedstock" and "eligible facilities" are at Appellant's disposal. Appellant has merely neglected to act on those alternatives and has, thus, not fulfilled its burden

## CONCLUSION

For the foregoing reasons, we respectfully request that the decision of the United States Court of Appeals for the Twelfth Circuit be AFFIRMED in favor of the Respondent.

Respectfully submitted,

*s/Team No. 12*
Team No. 12
*Counsel for Appellee, EPC*

February 13, 2017

**BRIEF CERTIFICATE OF COMPIANCE**

Pursuant to *Official Rule* III.C.9, Appellee certifies that its brief contains [32 pages] pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No.* **12,** and the *Team Members* of *Team No*. **12** have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

*Team No. 12*

## CERTIFICATE OF SERVICE

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

Respectfully submitted,

*Team No. 12*