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Seventh Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law

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UNITED STATES COURTOF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 16-01234
ORDER

State of Franklin,

Appellant,

-v.- D.C. No. 16-02345

Electricity Producers Coalition,

Appellee.

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

This case involves an appeal to the U.S. Court of Appeals for the Twelfth Circuit from a decision issued by the U.S. District Court for the Eastern District of Franklin granting declaratory and injunctive relief sought by the Electricity Producers' Coalition. The District Court found that the Energy Diversification and Expansion Act ("EDEA" or "the Act") enacted by the State of Franklin, as implemented by the Franklin Public Service Commission (and certain other state agencies in Franklin), is unconstitutional under the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution.

It is hereby ordered that the Electricity Producers Coalition ("EPC") and the State of Franklin ("State") brief the following issues:

1) 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.
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.

SO ORDERED

Entered this 6th Day of January, 2017

Factual Background

A. State Energy Legislation

In January 2016, the State of Franklin enacted the Energy Diversification and Expansion Act ("EDEA" or "the Act") with a goal of preserving the economic viability of the existing coal-fired generating plants and stimulating the development of a biomass industry.

At the time of EDEA's enactment, Franklin derived 82% of its electricity generation from coal, 10% from natural gas, 5% from wind, 2% from biomass, and 1% from solar photovoltaic ("PV"). As the third-largest coal producing state in the country (behind only Wyoming and West Virginia), Franklin had suffered dramatic declines in coal production during the preceding several years due to the availability of cheaper natural gas for generating electricity (owing principally to the development of shale gas resources within the mid-Atlantic region in which Franklin is located), as well as the declining prices of renewable resources, primarily wind and utility-scale solar PV, increasingly being integrated by electric utilities into their generating portfolios. As a result of these market forces, as well as more stringent environmental regulations promulgated by the U.S. Environmental Protection Agency in recent years, a number of large coal plants within Franklin were in financial distress, with the possibility of premature retirement. At risk was the contribution of such plants to the state's economy, 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. In addition, the anticipated loss of generating capacity within the region could threaten the reliability of the electric generating system, and hamper the ability of Franklin to attract and retain industrial and manufacturing jobs.

In addition to Franklin's abundant coal resources, 77 percent of the state is covered with forests, making Franklin the third most forested state in the country. Research performed at Franklin State University showed that residues produced during harvesting of forest products, fuel wood extracted from forestlands, and residues generated at primary and secondary wood processing facilities could provide sufficient feedstock to support a biomass industry, both for co-firing with coal at electric generating plants and for biomass-fired small power production facilities.

Consistent with the objectives of preserving the economic viability of existing coal-fired generation and stimulating the development of a biomass industry, EDEA includes the following three elements:

- Providing for financial incentives, in the form of Carbon Assistance Payments, or "CAPs," to eligible coal-fired generating plants serving Franklin, with the Franklin Public Service Commission ("PSC") charged with determining power plant eligibility and setting the level of CAPs, in accordance with the standards enunciated in the Act [EDEA, Section 1];

- Modifying Franklin's existing Renewable Portfolio Standard ("RPS") to impose a requirement on electric distribution companies to procure a portion of their electricity supply from electric generating plants that are co-fired with both coal and biomass and, more specifically, that the biomass portion be "certified biomass feedstock" constituting no less than 15 percent[1] of a generating plant's fuel supply [EDEA, Section 2(a)]; and
- Modifying Franklin's existing RPS to include a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass [EDEA, Section 2(b)].

In enacting EDEA, the Franklin legislature made the following findings and declarations, as set forth in the preamble to the Act:

i. The mid-Atlantic region has recently suffered the loss of significant electrical generation capacity due to the retirement of coal-fired generating plants, with additional retirements anticipated in the near future. As a result, the availability of a reliable electricity supply within Franklin to support economic growth and expanded employment opportunities for its citizens is threatened.

ii. The PJM Interconnection, which manages the regional electric power grid serving Franklin, lacks the authority to order new generation as a means of mitigating local electrical system reliability concerns and solve other issues related to the lack of local generation.

iii. The PJM capacity markets have failed to provide the necessary incentives to encourage the development of new generating capacity within the mid-Atlantic region, or to allow existing coal-fired generation to continue to operate. As a result, Franklin faces potential capacity deficiencies.

iv. The public interest will be served by adopting measures to provide additional financial support for existing coal-fired generating facilities, which will assist Franklin's economic development by ensuring a reliable and reasonably priced electricity supply.

v. Fostering and incentivizing the development of a limited program for new electric generating facilities will also help ensure sufficient capacity and stabilize power prices, as well as creating opportunities for employment in the energy sector in Franklin.

vi. Integrating biomass energy into the fuel supply for coal-fired power plants will provide substantial environmental benefits, as any displacement of pulverized coal with sustainably harvested biomass will result in reduced greenhouse gas emissions from electric generating resources. Co-firing biomass with coal will also diversify the electric generating portfolio and reduce the volatility of power prices.

[1] As measured by heat content in British thermal units ("BTUs").

vii. Franklin has the benefit of substantial biomass resource potential, given the extensive forests that cover vast portions of the State. Franklin has the opportunity to diversify its economy by taking advantage of the opportunities associated with the sustainable harvesting of its biomass resources.

viii. Fostering and incentivizing the development of distributed energy resources (DERs) within Franklin will also help ensure sufficient capacity and stabilize power prices, as well as creating opportunities for employment in the energy sector in Franklin. DERs increase the resilience of the electric utility grid, reduce transmission and distribution costs, and provide additional tools for customers to manage their energy costs. Combined heat and power (CHP) facilities in particular offer tremendous energy efficiency benefits that will result in lower energy costs for consumers.

ix. DERs fueled with sustainably harvested biomass would reduce the environmental impact of the energy industry, and foster economic growth in Franklin by stimulating the development of a biomass industry within the state.

Upon enactment of EDEA, Franklin Governor Emmanuel ("Manny") Carbon issued a signing statement that cited the economic benefits flowing from the Act, including the "necessary and vital support" for the coal miners in Franklin, "our state's most important industry"; the "opportunity to diversify the state's energy economy by tapping into Franklin's biomass resource potential"; and creating new jobs in the "energy industry of the future" by stimulating the growth of distributed generation resources.

B. The Electricity Markets in Franklin

Pursuant to the Electric Customer Choice and Competition Act of 1996, the State of Franklin restructured its electricity markets to introduce competition at the retail level. In contrast to states where energy markets are served by vertically integrated monopolies—i.e., one entity controls electricity generation, transmission and sale to retail customers—in Franklin, distribution utilities selling electricity to ratepayers purchase that electricity at wholesale from independent power producers, either through bilateral contracts or through competitive wholesale markets administered by Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs"), which are independent, non-profit entities regulated by the Federal Energy Regulatory Commission ("FERC"). (For a further discussion, see *The Federal Power Act and Interstate Electricity Markets* below.) 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 and the District of Columbia.

The PJM operating region, in turn, is divided into 21 locational marginal pricing ("LMP") zones, which are geographic areas within PJM that use market-based prices as a means for reflecting the impact of transmission congestion (i.e., the inability of energy to move throughout the entire PJM territory, due to inadequate transmission facilities). To some extent, LMP zones are "sub-markets" within the PJM region that reflect the relative

generation capacity (supply) and loads (demand) within a particular geographic area, given transmission constraints. Because low-cost energy cannot reach all demand due to inadequate transmission, the marginal cost of energy varies by location, which is reflected by the varying prices across the LMP zones.[2] The relative prices prevailing in the LMP zones can be used as a rough indicator of locations where additional transmission infrastructure (or, in the absence of that, additional generation capacity) may be necessary.

Of particular relevance to this case, three LMP 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 of which is located within Franklin and the remainder within the adjoining state of Vandalia; and (3) Allegheny North, about one-third of which is located within Franklin and remainder within the adjoining state of Allegheny.[3]

C. Administration of the Carbon Assistance Payment ("CAP") Program

The Franklin PSC was given primary responsibility for administering the CAP program. The Act directed the PSC to identify the coal-fired generating plants eligible to receive CAPs and to set the level of payments, in accordance with the requirements set forth in EDEA.

With respect to determining the eligibility of coal-fired generating plants, Section 1(a)(6) of EDEA provides that:

> "Eligible coal-fired generating plant" means any electric generating plant (i) located within the Franklin East, Vandalia South, or Allegheny North zones within the PJM operating region, (ii) which relies on coal as its primary fuel source, at least ten percent (10%) of which originates from coal mines located in whole or in part within the state of Franklin, and (iii) which has been determined by the Commission to require financial assistance to sustain its continued operations, based on the Commission's analysis and findings with respect to such plant's projected energy, capacity and ancillary service revenues and projected fuel and operating and maintenance (O&M) costs.

With respect to determining the price at which CAPs should be set, Section 1(a)(2) provides that:

> "Carbon Assistance Payments" shall be determined by the Commission. In setting the level of Carbon Assistance Payments, the Commission shall take into account (i) the incremental

[2] To illustrate, the real-time statistics section of the PJM home page shows the varying prices by the various LMP zones within the PJM region. http://www.pjm.com/

[3] Please note that these are fictional LMP zones created for purposes of this problem, and thus do not appear on PJM-associated material.

> capital and operating costs associated with coal-fired generating units as compared with competing sources of electricity, (ii) the extent to which energy, capacity and ancillary service revenues of eligible coal fired generating plants are insufficient to allow such plants to continue operating, (iii) the impacts of such Payments on ratepayers within Franklin, and (iv) the public interest.

The Act also prescribed the manner in which CAPs would be administered. In order to be eligible to receive CAPs, the generators must offer the capacity to the PJM Interconnection. Upon determination of eligibility by the Franklin PSC, the generating plant owner would be offered a ten-year contract administered by the Franklin State Energy Office ("SEO") to receive CAPs. The amount of CAPs to be sold annually to eligible units would be capped annually at a megawatt hour (MWh) amount that represents the verifiable historic contribution such units have made to the electricity generating mix consumed by retail electricity customers within Franklin. The SEO, in turn, would collect the revenues necessary to fund the CAPs through assessments against the five electric distribution utilities operating within Franklin, based on the proportion of each utility's electric energy load in relation to the total electric energy load served by all utilities within Franklin.[4] The Commission, in turn, would set rates for each utility that enables such utility to recover the costs of its CAP assessment in the retail rates for electric customers located within Franklin.

Following passage of EDEA in January 2016, the PSC initiated a proceeding in February 2016 to implement the Act and, among other things, make the necessary determinations in accordance with the statutory guidance provided in the Act. Following three months of workshops and an expedited informal rulemaking process, the PSC issued its EDEA Implementation Order in June 2016 which included the following findings:

- Eligible coal-fired generating plants. For the ten-year contract period commencing September 1, 2016, the Commission identified five coal-fired generating plants, with an aggregate generating capacity of 3500 MW, that met the requirements of Section 1(a)(6) of EDEA. 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). The Commission also made findings with respect to the verifiable historic contribution each unit has made to the electricity generating mix consumed by retail electricity customers within Franklin.
- Setting the Level of Carbon Assistance Payments. For the ten-year contract period commencing September 1, 2016, the Commission set the CAP at $18.50 per MWh. The Commission's determination was based, in part, on the analysis of a power

[4] For example, assuming SEO incurs $75 million in a given year associated with the CAP program, a utility serving 20 percent of the electric energy load within Franklin would be assessed $15 million for such year, to be recovered in such utility's retail rates through a rate proceeding before the Commission.

> supply expert retained by the Commission that examined, among other things, the relative bids for capacity bid into the PJM capacity markets in its periodic capacity auctions for coal-fired generating units versus non-coal-fired generating units. Taking into account these findings, as well as the comments submitted by participants in the Commission's rulemaking proceeding, the Commission determined that the $18.50/MWh CAP would meet the requirements of Section 1(a)(2) of the Act.

Under the terms of the PSC's EDEA Implementation Order, the CAP program would commence as of September 1, 2016.

D. Modifications to Franklin's Renewable Portfolio Standard

1. Franklin's Existing RPS

A Renewable Portfolio Standard (RPS) or Renewable Energy Standard typically requires utilities selling electricity to end-use customers to generate or purchase a specific percentage of its electricity supply from renewable sources. If a seller fails to procure sufficient renewable energy, it must pay penalties.

Franklin's RPS was enacted in 2007, and requires the five electric distribution companies operating within Franklin 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. Eligible renewable energy resources were defined to include solar, wind, geothermal, biomass, and small-scale or run-of-river hydro.

2. Determination of Certified Biomass Feedstock under Section 2(a) of EDEA

The Franklin PSC has primary authority over administration of the existing RPS, and was assigned the responsibility to make the necessary findings to implement the changes to the RPS embodied in EDEA. As noted above, Section 2(a) of the Act modified Franklin's existing RPS to include 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 15 percent certified biomass feedstock. Specifically, Section 2(a) sets the procurement obligation for electricity generated at co-fired power plants at 3 percent beginning in 2020, and growing to 5 percent by 2030.

With respect to certifying the biomass feedstock that is eligible for certification, Section 2(a)(3) of EDEA provides that:

> "Certified biomass feedstock" means biomass feedstock that is harvested from a forest identified by the Franklin Department of Natural Resources and the Franklin Division of Commerce as a "Designated Biomass Growing Region" pursuant to Section ~~1~~2(a)(4) of this Act.

Section 2(a)(4) of EDEA, in turn, defined "Designated Biomass Growing Region" 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.

Following passage of EDEA in January 2016, Franklin's Department of Natural Resources and Division of Commerce initiated a joint proceeding in February 2016 to implement the Act and, among other things, make the necessary determinations in accordance with the statutory guidance provided in the Act. Following three months of workshops and an expedited informal rulemaking process, the agencies issued their Biomass Eligibility Determination Order in June 2016 which identified two Designated Biomass Growing Regions:

- Franklin-Allegheny State Forest. This forest covers 756 acres that straddle the Franklin-Vandalia state line, with 506 acres within Franklin and 256 acres within Vandalia. This forest features hardwood species that are particularly suited for biomass used for generating electricity, including poplars, oaks, birches, beeches and willows. The three counties within Franklin that are covered in part by the Franklin-Allegheny State Forest have unemployment rates of 9.7 percent, 12.3 percent and 10.9 percent, respectively, and have suffered disproportionately from the downturn in the coal industry.
- Central Appalachian Forest. This forest covers 422 acres, entirely within Franklin. This forest features softwood species that are particularly suited for biomass used for generating electricity, including pine, fir and spruce. The two counties within Franklin that are covered in part by the Central Appalachian Forest have unemployment rates of 14.6 percent and 9.8 percent, respectively, and have also suffered disproportionately from layoffs associated with coal mine closures.

3. Administration of RPS Carve-Out for Biomass-Fueled, Customer-Sited CHP Facilities

The Franklin PSC has primary authority over administration of the existing RPS, and was assigned the responsibility to make the necessary findings to implement the changes to the RPS embodied in EDEA. As noted above, Section 2(b) of the Act modified Franklin's 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 effect of the carve-out is to require that a 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) of the Act sets the procurement obligation for this particular category of sources at 0.5 percent beginning in 2020, and growing to 1.0 percent by 2030. Unlike the procurement obligation with respect to biomass co-fired with coal in Section 2(a) of the Act, Section 2(b) does not require the fuel for eligible CHP facilities to be "certified biomass feedstock." Given that the 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, however, eligible CHP facilities by definition are located exclusively within the state of Franklin.

Legal Background

A. The Supremacy Clause of the U.S. Constitution

Article VI, Section 2 of the Constitution, known as the Supremacy Clause, establishes that the Constitution and the laws of the United States "shall be the Supreme law of the land." The Supremacy Clause empowers Congress to preempt or supersede State law. Congress can do so expressly with explicit statutory language or by implication when a Federal law occupies the same field as or conflicts with State law.

In evaluating whether a State law is preempted by a Federal statute or regulation, courts typically start with the assumption that State powers are not superseded by a Federal act unless that is the clear purpose of Congress. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) When Congress has not expressly stated its intent, courts can infer Congress' intent to occupy a given field of regulation if it has legislated comprehensively, leaving no room for States to supplement. Similarly, courts can infer "field preemption" if Congress' act relates to a field where the Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of State laws on the same subject. *English v. Gen. Elec. Co*., 496 U.S. 72, 79 (1990)

Courts can also infer "conflict preemption" when there is a conflict between a State law and a Federal statute or regulation. Courts can identify such a conflict when a State law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995) When a Court determines that there is a conflict, the relative importance of the State's interest is immaterial; State law must always yield to Federal interests.

B. The Federal Power Act and Interstate Electricity Markets

The Federal Power Act, enacted in 1935, granted Federal regulators (currently FERC) authority over "the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce." The Act constrained the reach of Federal authority "to extend only to those matters which are not subject to regulation by the States." States therefore retained authority over retail sales to end-use consumers, such as residents and local businesses.

Today, interstate sales can either be bilateral between a buyer and seller, or through a regional wholesale market. The term of a bilateral sale can be between many years to just a single hour. Sales of energy in organized wholesale markets are all short-term, typically for a single hour.

Of the seven regional markets in the U.S. operated by RTOs or ISOs, the state of Franklin is located within the region served by the PJM Interconnection, as noted above. Acting as a neutral, independent party, PJM operates a competitive wholesale electricity market and manages the high-voltage electricity grid to ensure reliability for more than 61 million people. PJM operates its market in accordance with tariffs approved by FERC. Typically, these organized markets run through single-price clearing auctions. Generators submit offers to sell quantities of energy, and buyers, such as electric distribution utilities selling electricity to ratepayers, submit offers to buy. The RTO/ISO computes the clearing price where supply intersects with demand, and then accepts all buyers' bids above the clearing price and all sellers' offers below the clearing price. The RTO/ISO then orders those sellers to produce energy.

In addition to energy, power plant owners can also sell capacity. Capacity payments compensate plants for having the ability to generate energy. Within PJM (as in most RTO/ISO markets), the electric distribution utilities must contract for sufficient capacity to meet their demand. Depending on the market, capacity can be purchased bilaterally or through RTO/ISO-organized auctions. In some markets, buyers can also meet their capacity obligation by procuring demand-side resources, such as demand response or energy efficiency.

C. The Dormant Commerce Clause

Article I, Section 8 of the Constitution, known as the Commerce Clause, provides Congress with the power to "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." From this authorization of Congressional power, Courts have inferred a restriction on State power known as the "dormant Commerce Clause." This doctrine prohibits a State from discriminating against or unduly burdening interstate commerce. According to the Supreme Court, this prohibition on interfering with interstate commerce was rooted in the Framers' concern that economic Balkanization had the potential to doom the new union between the States. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

Under dormant Commerce Clause precedent, courts will typically strike down a State law if it expressly mandates differential treatment of in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter. *Granholm v. Heald*, 544 U.S. 460, (2005). Such laws are considered facially discriminatory, and courts subject them to strict scrutiny review. This exacting standard requires a State to demonstrate that the law has a non-protectionist purpose and that there is no less discriminatory means for achieving that purpose.

Procedural Background

A. Electricity Producers Coalition ("EPC")

The Electricity Producers Coalition ("EPC") is the national trade association representing leading competitive electric power suppliers, and is incorporated under the laws of the District of Columbia. EPC's members include companies that are involved in competitive wholesale and retail electricity markets, with significant financial investments in electricity generation and electricity marketing operations in Franklin and throughout the PJM operating region.

B. Commencement of the Federal Court Action

EPC commenced this action on July 1, 2016 in the Federal District Court for the Eastern District of Franklin, following Franklin PSC's issuance of its EDEA Implementation Order and the issuance of the Biomass Eligibility Determination Order by Franklin's DNR and Division of Commerce. EPC sought a declaratory ruling that (1) the CAP program violates the Supremacy Clause of the U.S. Constitution given FERC's exclusive authority over "the sale of electric energy at wholesale in interstate commerce," and (2) the modifications to Franklin's RPS violate the dormant Commerce Clause of the U.S. Constitution given their discriminatory impact on interstate commerce. In light of the proposed implementation date of September 1, 2016 for the CAP program, EPC also sought injunctive relief to prevent EDEA from being implemented until the legal issues could be resolved.

Federal courts have jurisdiction over the subject matter under 28 U.S.C. § 1331 because the claims arise under federal law, specifically the Supremacy Clause and the Commerce Clause of the U.S. Constitution.

C. District Court Decision

Shortly after the action was commenced in U.S. District Court for the Eastern District of Franklin in July 2016, EPC and Franklin filed cross-motions for summary judgment. In its decision issued on November 7, 2016, the District Court granted EPC's motion for summary judgment, finding that:

1) Section 1 of EDEA is "field preempted" under the Supremacy Clause of the U.S. Constitution because FERC has exclusive jurisdiction under the Federal Power Act with respect to the sale of electric energy and the sale of capacity at wholesale in interstate commerce. The District Court found that the practical effect of the CAP

would be to interfere with wholesale power markets—particularly the setting of capacity prices by PJM—inasmuch as the coal-fired plants receiving CAPs would be receiving substantial out-of-market payments that effectively set a higher, above-market price for electricity sold by the subsidized generators.

2) Section 1 of EDEA is also "conflict preempted" under the Supremacy Clause of the U.S. Constitution because FERC—the agency charged with administering the Federal Power Act—has determined that market-based processes approved and overseen by FERC are the best way to bring more efficient, lower cost power to U.S. electricity customers. According to the District Court, the CAP scheme would interfere with the market signals that are intended to be provided by the competitive auction market process for capacity conducted by PJM, which may result in discouraging potential investors from financing and building new economic generation.
3) Section 2(a) of EDEA is invalid under the dormant Commerce Clause of the U.S. Constitution because the geographic limitation of "certified biomass feedstock" under EDEA is limited to areas primarily located within the state of Franklin. The District Court found that the geographic limitation in "certifying" the biomass feedstock impermissibly discriminates against biomass produced outside of the state of Franklin, and thus burdens interstate commerce.
4) Section 2(b) of EDEA is invalid under the dormant Commerce Clause of the U.S. Constitution because of the geographic limitation of "eligible facilities" to customer-sited generation connected to the grid of electric distribution utilities serving retail customers within the state of Franklin. According to the District Court, the design of Section 2(b) by its very nature excludes the participation of energy providers outside of the state of Franklin, and the state has articulated no basis to justify this burden on interstate commerce.

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

D. Appeal to the Twelfth Circuit Court of Appeals

In its appeal filed with the Twelfth Circuit on December 6, 2016, Franklin 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. Franklin claims that its CAP program falls well within state authority to regulate generation facilities and retail electric prices. According to Franklin, the CAP program operates completely independently from PJM's capacity auction process, and merely provides supplemental payments to a narrowly defined group of generators (i.e., coal-fired generating plants serving Franklin that are found to require financial assistance to remain in operation) in order to avoid capacity deficiencies within its borders. Franklin denies that the CAP program has the effect of setting wholesale capacity prices, and similarly denies that it interferes with the operation of the competitive market forces envisioned under FERC's regulatory scheme.

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. According to Franklin, state action to encourage environmentally beneficial actions—such as substituting sustainably harvested biomass for coal in a power plant's fuel supply—does not fall within proscribed actions under the dormant Commerce Clause. Franklin also emphasizes that 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. Similarly, Franklin denies that its RPS provision promoting distributed generation resources runs afoul of the dormant Commerce Clause. The purpose of the provision, according to Franklin, is not to discriminate against out-of-state renewable resources, but rather to capture the unique benefits of customer-sited generation, such as improved resilience of the electric utility grid, reduced transmission and distribution costs, and increasing the ability of customers to manage their energy costs.

EPC, for its part, 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 ERDA in this appeal to the Twelfth Circuit Court of Appeals.

[NOTE: No decisions decided or documents dated after January 1, 2017 may be cited either in briefs or in oral arguments.]