C.A. No. 16-01234

IN THE UNITED STATES COURT OF APPEALS FOR THE

TEWLFTH CIRCUIT

March Term, 2017

State of Franklin,

Appellant,

v.

Electricity Producers Coalition,

Appellee.

On Appeal in the United States Court of Appeals for the Twelfth Circuit

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BRIEF FOR THE APPELLANT

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STATEMENT OF JURISDICTION

The United Stated District Court for the Eastern District of Franklin entered a summary judgment on November 7, 2016. *See Energy Producers Coal. v. Franklin*, D.C. No. 16-02345 (E.D. Frank. Nov. 7, 2016). Jurisdiction in that court was proper under 28 U.S.C. § 1331 (2012). Franklin filed this appeal on December 6, 2016. Review of the district court's final judgment is proper in this court under 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

The standard of review is *de novo* for questions of law, *see Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014), including preemption questions, *see Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir. 1996); *AGG Enters. v. Washington Co.*, 281 F.3d 1324, 1327 (9th Cir. 2002); *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068 (11th Cir. 2010), and dormant Commerce Clause questions. *See Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006). All four question before this court are subject to *de novo* review.

ISSUES PRESENTED

1. Whether Franklin's CAP Program that provides direct subsidies to certain generation facilities consistent with the economic needs of the state avoids field preemption by FERC's regulation of interstate transmission and wholesale transactions.
2. Whether Franklin's CAP Program that provides direct subsidies to certain generation facilities consistent with the economic needs of the state avoids conflict preemption by FERC's regulation of interstate transmission and wholesale transactions.
3. Whether Section 2(a) of the Energy Diversification and Expansion Act is constitutionally valid in light of the Dormant Commerce Clause.
4. Whether Section 2(b) of the Energy Diversification and Expansion Act is constitutionally valid in light of the Dormant Commerce Clause.

STATEMENT OF THE CASE

This suit originated in the Eastern District of Franklin with a complaint filed by the Energy Producers Coalition (EPC) against the State of Franklin in July 2016. The suit challenged the constitutionality of Franklin's Energy Diversification and Expansion Act (EDEA). *See* Energy Diversification and Expansion Act (2016). After both parties filed cross motions for summary judgment, the district court ruled in favor of EPC on four grounds. The district court found that Section 1 of the EDEA was both field preempted and conflict preempted by the Federal Power Act (FPA), *see* 16 U.S.C. § 824 *et seq.* (2012), and its implementing regulations, overseen by the Federal Energy Regulatory Commission (FERC). The court incorrectly reasoned that the CAP Program that Section 1 creates would improperly interfere with the interstate wholesale market, which is regulated by the FERC. The court also found that Sections 2(a) and 2(b) violated the dormant Commerce Clause by burdening out-of-state biomass and energy producers.

STATEMENT OF FACTS

The State of Franklin enacted the Energy Diversification and Expansion Act (EDEA) in January 2016 with the goal of ensuring adequate renewable and reliable electrical generation in Franklin. Energy Diversification and Expansion Act (2016). The PJM Interconnection is an Independent Service Operator (ISO) that manages the regional transmission of electricity in a number of East Coast, Midwest, and Appalachian States. The State of Franklin is located in the region served by the PJM Interconnection. PJM has struggled to ensure consistent electrical generation within the region it covers due to the closing of coal plants and the congestion in its transmission lines. *Id*. Franklin passed the EDEA in response to the closing of coal plants, the need for renewable and reliable electricity production, and the need to promote the biomass industry in the State of Franklin. The EDEA (1) provides economic incentives in the form of

Carbon Assistance Payments (CAPS) to eligible coal-fired generating plants serving Franklin, (2) modifies the existing Renewable Portfolio Standard (RPS) to require that "certified biomass feedstock" constitutes, at minimum, 15% of the fuel used by Franklin generators, and (3) provides an exception to the RPS for Combined Heat and Power (CHP) and cogeneration facilities. The EDEA is intended to preserve the economic viability of existing coal fired generating plants, to stimulate the development of a biomass industry, and to provide the State of Franklin with renewable and reliable electricity.

The State of Franklin's legislature made a number of findings that led to the EDEA's enactment:

- The retirement of coal-fired generating plants in the State of Franklin has led to a significant loss of electrical generation capacity, which in turn resulted in a lack of reliable electricity.
- The PJM Interconnection lacks the authority to incentivize the development of new generation capacity and is unable to address the need for local generation. The inadequacy of the existing transmission facilities compounds this problem. As a result, Franklin faces potential capacity deficiencies.
- It is necessary for the State of Franklin to provide financial support to existing coal-fired generating facilities and to incentivize the development of new electric generating facilities in order to ensure sufficient capacity and stabilize power prices.
- It is necessary to amend Franklin's RPS in order to integrate biomass energy into the fuel supply for coal-fired power plants. This will provide substantial environmental benefits, diversify the electric generating portfolio, and reduce

> the volatility of power prices. Franklin has a substantial biomass resource potential, given the extensive forests that cover vast portions of the State.

Energy Diversification and Expansion Act pmbl. (2016).

Section 1 of the EDEA provides financial incentives, in the form of Carbon Assistance Payments (CAPs) to eligible coal-fired generating plants serving Franklin, with the State's Public Service Commission (PSC) charged with determining power plant eligibility and setting the level of CAPs, in accordance with the standards set forth in the Act. *Id*. Once PSC has determined that a coal-fired generating plant is eligible, that generator may sign a ten-year contract and receive CAPs. *Id*. Under the EDEA, CAPs are sold annually, but are distributed based on a generator's historic megawatt contribution to Franklin's power supply. *Id*.

Section 2(a) of the EDEA modifies Franklin's existing RPS. The Franklin PSC has primary authority over the administration of the existing RPS and implemented the changes embodied in the EDEA. Section 2(a) requires that electric distribution utilities to have at least fifteen percent of the energy they purchase generated by burning certified biomass feedstock. Co-fired power plants are required to have three percent of their fuel comprised of certified biomass feedstock beginning in 2020, increasing to five percent by 2030.

Section 2(a)(3) details that the biomass feedstock eligible for certification must be "harvested from a forest identified by the Franklin Department of Natural Resources and the Franklin Division of Commerce as a 'Designated Biomass Growing Region.'" Energy Diversification and Expansion Act § 2(a)(3) (2016). The Designated Biomass Growing Regions are the Franklin-Allegheny State Forest and the Central Appalachian Forest. Energy Diversification and Expansion Act § 2(a)(4) (2016). Franklin's legislature selected these forests

because they contain "biomass suitable for sustainable harvest and use as a feedstock for co-firing with coal to generate electricity." *Id.* Additionally, the Franklin Division of Commerce determined that these forests are located in an economically depressed area. *Id.* Franklin's legislature found that diversifying the economy through biomass resources will create new jobs in the energy industry.

The Designated Biomass Growing Region is located both inside and outside the State of Franklin. The Franklin-Allegheny State Forest crossed the Franklin-Vandalia state line, with 506 acres in Franklin and 256 acres in Vandalia. Franklin's Division of Commerce found that the unemployment rates in the three counties in which this area falls are 9.7 percent, 12.3 percent, and 10.9 percent. The Central Appalachian Forest is entirely within the State of Franklin. The unemployment rates within the two counties covered by this forest are 14.6 percent and 9.8 percent. The substantial biomass resource potential will provide environmental benefits, create opportunities for employment in the energy sector, and reduce the volatility of power prices. Energy Diversification and Expansion Act pmbl. (2016).

Section 2(b) of the EDEA exempts Combined Heat and Power (CHP) or Cogeneration facilities that rely in part on biomass fuel sources from Franklin's RPS in order to promote the use this type of facility. *See* Energy Diversification and Expansion Act pmbl. (2016). The Act does not require that the biomass used by these generators originate within the State of Franklin, and it does not require these generators to satisfy the other certified biomass requirements. The statute does not require that the facilities distribute their energy exclusively to Franklin. Section 2(b) applies to CHP and cogeneration facilities that are located on the end-user's premises. Section 2(b) also requires that the facilities connect to the distribution grid of an electric distribution company serving customers within Franklin.

Franklin's legislature has found that existing sources of energy are inadequate, creating a power shortage that is unable to sustain economic growth. The rapid decline of coal-fired plants throughout Franklin, the inadequate transmission infrastructure, and Franklin's need to promote renewable energy led the State to take the necessary and lawful action set forth in Section 2(b).

SUMMARY OF ARGUMENT

The EDEA created the CAP Program pursuant to Franklin's traditional state power over the regulation of electricity generation, and is therefore not preempted by federal law or regulation. Although FERC has "exclusive jurisdiction" over interstate wholesale transactions and transmission, *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016), the regulation of generation is a traditional state power. *See Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). As the CAP Program is focused on protecting the financial health of coal-fired generation facilities, it falls squarely outside the federal field of regulation. Because the only effect this program has or could have on interstate transmission or wholesale transactions is merely incidental, it will not be preempted for such effects alone. *See Talen*, 136 S. Ct. at 1298. The CAP Program's goal is to protect generation facilities that are crucial to Franklin's economy, and is therefore "plausibly" the targeted at correcting a "legitimate state concern." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 518 (1989).

Likewise, the CAP Program does not conflict with federal law or regulation, and is thus not preempted by way of a conflict. Conflict preemption only occurs where compliance with all relevant laws is impossible, federal objectives are frustrated, or the impact on a federally regulated area is intentional rather than incidental. *See id.* at 515. Nothing about coal-fired generators receiving subsidies that are necessary to their financial survival makes participation in the federally regulated wholesale market impossible. The CAP Program does not hinder FERC's efforts to regulate interstate transmission and wholesale transactions consistent with the public interest because it does not substantially change the interstate market. Rather the CAP Program preserves the status quo, with only incidental impact on interstate transmission and the wholesale market.

Section 2(a) of the EDEA is constitutionally valid and does not run afoul of the dormant Commerce Clause because it does not require different treatment of in-state and out-of-state entities, and Franklin's local interest in promoting biomass fuel use outweighs any potential effect of Section 2(a) on interstate commerce. The EDEA's promotion of biomass in electricity generation does not have a "direct and substantial" impact on interstate commerce because it does not favor the protection of in-state entities at the expense of out-of-state entities. *S. Union Co. v. Missouri Pub. Serv. Comm'n*, 138 F.Supp.2d 1201, 1206 (W.D. Mo. 2001). Any burdens that Section 2(a) imposes are applied equally to in-state and out-of-state energy generators. The EDEA simultaneously protects Franklin's environment and supports Franklin's economy, and is the least burdensome means of attaining those goals.

Likewise, Section 2(b) of the EDEA is constitutionally valid because it does not aim to favor in-state entities over out-of-state entities, and is not motivated by protectionism. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 402 (1994). The promotion of certain types of generation facilities in order to improve the economy and ensure the availability of an adequate energy supply is a "legitimate state interest" that does not have protectionist goals. *Id.* at 389. Furthermore, there is no less discriminatory means of attaining Franklin's objectives.

ARGUMENT

I. The CAP Program is not field preempted by the FPA because the Program does not encroach on FERC's authority.

State action is only field preempted by federal law where Congress so thoroughly regulates a field that there is "no room for the States" to legislate concurrently. *Nw. Cent.*, 489 U.S. at 509. When dealing with a field traditionally regulated by the states, as is the case here, there is a presumption *against* preemption "unless [preemption] was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). There must be

"sufficiently comprehensive" federal legislation before an inference of Congressional intent to preempt becomes "reasonable." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Furthermore, the mere fact that federal and State regulation touch the same type of business "alone is not sufficient to nullify the state law." *Hartford Accident & Indem. Co. v. People of the State of Illinois ex rel. McLaughlin*, 298 U.S. 155, 158 (1936). And where the federal and State laws cover different areas within the same field, there is no field preemption. *See id.*

For these reasons, Franklin's implementation of the CAP program is not field preempted because Congress expressly declined to regulate generation. *See* 16 U.S.C. § 824(b)(1) (2012) (specifically excluding "facilities used for the generation of electric energy" from FERC's jurisdiction). Furthermore, there can be room for State regulation in light of the relevant federal scheme notwithstanding incidental effects on areas subject to FERC's regulation. *Hillsborough Cty.*, 471 U.S. at 713.

A. The CAP Program does not encroach on FERC's authority because FERC's authority does not extend to electricity generation as relevant here.

FERC does not have jurisdiction over the generation of electric energy because Congress has expressed its "clear and manifest purpose" to reserve authority over generation to the States in the FPA. *Rice*, 331 U.S. at 230. The FPA only grants FERC jurisdiction over the "transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce." § 824(b)(1). It expressly did not grant FERC jurisdiction over other electricity sales, intrastate transmission facilities, or "*facilities used for the generation of electric energy*." *Id.* (emphasis added). New generating facilities, and "their economic feasibility, . . . have been characteristically governed by the States." *Pac. Gas*, 461 U.S. at 205. The traditional power that the States exercise over generation creates a presumption against preemption. *See Rice*, 331 U.S. at 230.

The Electricity Producers Coalition cannot overcome this presumption. The CAP Program cannot encroach on FERC's jurisdiction because the Program exclusively concerns the generation of electric energy. The preamble of the EDEA outlines the Act's objective of "provid[ing] financial support for existing coal-fired generating facilities" in order to prevent "capacity deficiencies." Energy Diversification and Expansion Act (2016). At the same time, Franklin's legislature saw the potential positive impact of this program on "opportunities for employment in the energy sector in Franklin." *Id.* The Act notes specifically that PJM "lacks the authority to order new generation," which limits the avenues available to Franklin when addressing future capacity issues. *Id.* The CAP Program is designed to address these concerns by protecting the "economic feasibility" of financially at-risk generation facilities. *Pac. Gas*, 461 U.S. at 205. Because Congress explicitly denied FERC jurisdiction over generation facilities, *see* § 824(b)(1), Franklin's decision to subsidize generation facilities to protect the local capacity availability and boost the local economy falls well outside the field that FERC regulates.

States are free to regulate generation even where there are incidental impacts on areas within FERC's jurisdiction so long as there is not an intrusion on "FERC's authority over interstate wholesale rates." *Talen*, 136 S. Ct. at 1298. The CAP Program makes absolutely no attempt to "second-guess the reasonableness of interstate wholesale rates," and indeed the pertinent parts of EDEA never even mention wholesale rates. *Id.* CAP subsidies are based only on (1) geographical location, (2) reliance on coal, with a substantial portion of that coal originating in Franklin, and (3) the necessity of subsidies to "sustain its continued operations." Energy Diversification and Expansion Act § 1(a)(6) (2016). The fact that these subsidies are not conditioned on clearing the

PJM auction[1] means that the CAP payments are not "compensation for interstate sales at wholesale." *PPL EnergyPlus, LLC, v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014). Therefore the CAP payments do not "set[] interstate wholesale rates." *Id.* at 478. Because the CAP Program does not "condition payment of funds on capacity clearing the [wholesale] auction" regulated by FERC, it is free from the "fatal defect" that the Supreme Court has found in the programs of at least one other State. *Talen*, 136 S. Ct. at 1299. *Talen* was a "limited" holding that did not foreclose the "various other" programs that a State such as Franklin could implement, including "direct subsidies." *Id.*

Furthermore, the CAP Program does not set its subsidy rate based on the wholesale price of a generator's power, *cf. id.* at 1295, but instead bases the subsidies on (1) the added costs of operating a coal plant compared to other generators, (2) the relative insufficiency of the plant's revenue in meeting basic operation costs, (3) the impacts on the *retail* price, and (4) the public interest. *See* Energy Diversification and Expansion Act § 1(a)(2) (2016). In implementing the statute, the PSC considered generators' supply projections and the size of their capacity bids, arriving at a subsidy rate of $18.50 per Megawatt Hour. *See* EDEA Implementation Order (June 2016). While the EDEA considered capacity bids in setting the subsidy amount, it did not condition the subsidies on the capacity bids clearing the PJM auction.

For these reasons, the CAP Program lies outside of FERC's jurisdictional bounds, *see* § 824(b)(1), and is not field preempted.

[1] Although power generators are required to actually offer capacity to the PJM interconnection, the subsidies are not conditioned on these bids actually being accepted or clearing the auction. This stands in stark contrast to the program at issue in *Talen*.

B. Mere incidental effect on areas within FERC's control alone will not be enough to preempt the CAP Program.

Franklin is free to regulate generation "even when [the CAP Program] incidentally affect[s] areas within FERC's domain." *Talen*, 136 S. Ct. at 1298. In a case dealing with analogous preemption questions, *see id.* at 1298 n. 10, the Supreme Court clarified that it is "the *target* at which the state law *aims*" rather than the unintentional side effects of the state law that determines the preemption question. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (emphasis in original). Regardless of how subsidy programs may hypothetically touch wholesale power rates, it is only where the state law purports "to conclude . . . that the FERC-approved wholesale rates are unreasonable" that a State's regulation of generation or retail rates be preempted. *Miss. Power and Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988). To avoid preemption, an impactful state regulation must only be "plausibly . . . related to matters of legitimate state concern." *Nw. Cent.*, 489 U.S. at 518.

The "*target* at which [the CAP Program] *aims*" *Oneok*, 135 S. Ct. at 1599, is the protection of "Franklin's economic development by ensuring a reliable and reasonably priced electricity supply." Energy Diversification and Expansion Act pmbl. (2016). It seeks to accomplish this goal by providing "financial support for existing coal-fired generating facilities." *Id.* At no point does the EDEA make any statement or judgment about the adequacy of FERC's wholesale rate setting practices. It is generation incentives not wholesale rates, that concerns Franklin's legislature. *See id.* Given that generation is a matter traditionally reserved to the States, the CAP Program is a matter of state concern. *See Pac. Gas*, 461 U.S. at 206. As the EDEA does not aim to effect wholesale rates or transmission, it is not preempted, regardless of any incidental impacts the CAP Program may actually or hypothetically have on wholesale transactions. *See Talen*, 136 S. Ct. at 1298.

II. The CAP Program is not conflict preempted because Franklin's subsidization program does not conflict with the FPA.

The CAP Program in no way makes "compliance with both federal and state regulations is a physical impossibility," nor does it create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas*, 461 U.S. at 204 (internal quotations omitted). Conflict preemption "must be applied sensitively" in FPA cases in order to "prevent the diminution of the role Congress reserved to the States . . . ." *Nw. Cent.*, 489 U.S. at 515.[2] For conflict preemption to be appropriate, either compliance with all relevant laws must be impossible, federal objectives must be frustrated, or the impact on the federally regulated area must be intentional rather than incidental. *See id.* None of these three conditions is the case here.

A. The CAP program does not conflict with federal law because it does not make it impossible to comply with all relevant federal and state laws.

Impossibility of compliance concerns have little to no application in this case because the relevant laws and regulations are so unrelated that compliance with both is not an issue. This is because the CAP Program does not impose any requirement on the generators that overlaps with FERC's regulation of wholesale transactions and transmission. FERC provides for participation in the wholesale market through interstate transmission lines, which are operated by the PJM. *See e.g.* Order No. 888, 75 FERC 61,080 (1996) (requiring open transmission and laying the groundwork for the modern ISO landscape). The EDEA provides subsidies to ensure the economic viability and survival to certain coal-burning plants, which are critical to the local economy. Energy Diversification and Expansion Act § 1(a)(6) (2016). It is not impossible to sell power on the wholesale market according to FERC's regulations and also receive subsidies that necessitate

[2] Cases concerning preemption and the Natural Gas Act are directly applicable to similarly situated FPA cases due to the similarities between the two statutes. *See Talen*, 136 S. Ct. at 1298 n. 10.

survival according to Franklin's CAP Program. For this reason, the CAP Program is not conflict preempted on impossibility of dual compliance grounds.

B. The CAP program does not conflict with federal law because it does not frustrate the wholesale market-based process overseen by FERC.

FERC's statutory purpose is overseeing interstate portions of the nation's electrical system consistent with the public interest. FERC's jurisdiction extends "*only* to those matters which are not subject to regulation by the States." *See* 16 U.S.C. § 824(a) (2012) (emphasis added). Because the CAP Program does not "prevent[]" FERC from regulating the wholesale market consistent with the public interest, it does not frustrate FERC's goals. *Nw. Cent.*, 489 U.S. at 516.

There is absolutely no "potential [for the CAP Program] to seriously distort" the wholesale market, especially given that the CAP Program does not seek to "construct new capacity or expand existing resources." *PPL EnergyPlus, LLC*, 753 F.3d at 478–79. The Program merely seeks to prevent the economic demise of certain types of generation. Energy Diversification and Expansion Act pmbl. (2016). By limiting subsidies to historic market capacity contributions, the Program refrains from affecting prices in the "[c]apacity auctions under the [PJM's investment-attraction program]," which only comes into play after existing "market participants have committed the resources they will supply themselves." PJM Interconnection, LLC, 132 FERC ¶ 61,173, at 61,870 (2010). Because the CAP Program only subsidizes *existing* generation, there is absolutely no "potential to seriously distort" any federal incentive scheme aimed at creating *new* generation. *PPL EnergyPlus, LLC*, 753 F.3d at 478–79. Thus the CAP Program does not frustrate any federal goals or programs.

C. The CAP Program has at most only an incidental and unintentional impact on the wholesale market.

Any impact that the CAP Program may have on federal action is purely incidental and unintentional, and thus acceptable. *See Talen*, 136 S. Ct. at 1298. The intended target of a state

law bears particular significance in "determining whether that law is [preempted]." *Oneok*, 135 S. Ct. at 1599. If effect on the wholesale market is not an intended purpose of a state's law, then a "regulation might have affected the costs of and the prices of interstate wholesale sales" is not preempted. *Id.* at 1600.

The CAP program is targeted at providing "financial support for existing coal-fired generating facilities" in order to boost "Franklin's economic development" and prevent future electricity shortages. Energy Diversification and Expansion Act pmbl. (2016). The availability of a "reasonably priced electricity supply" is merely a positive side effect of subsidizing coal-fired plants consistent with Franklin's "public interest." *Id.* At no point in the relevant portions of the EDEA does Franklin's legislature ever mention wholesale rates. *See id.* And although generators are required to at least offer capacity to the wholesale market, the statute does not attempt to regulate that market. *Id.* Thus any impact that the CAP Program's subsidies would possibly have on the wholesale market are purely incidental.

III. Section 2(a) of the Energy Diversification and Expansion Act is Constitutionally Valid Because it Does Not Violate the Dormant Commerce Clause.

Congress has the constitutional power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I § 8 cl. 3. The Commerce Clause functions "as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 411 U.S. 332, 396 (1979). State laws or regulations that impose economic protectionism potentially violates "the unwritten rule[] described as the 'dormant Commerce Clause.'" *Granholm v. Heald*, 544 U.S. 460, 494 (2005) (Stevens, J., dissenting); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The dormant Commerce Clause invalidates laws that are either per se invalid or fail the *Pike v. Bruce Church* balancing test. 397 U.S. 137 (1970).

A. Section 2(a) of the Energy Diversification and Expansion Act is not per se invalid.

The dormant Commerce Clause invalidates State regulations that "[mandate] differential treatment of in-state and out-of-state economic interests." *Heald*, 544 U.S. at 472. The Clause reaches a regulation discriminates on its face or in practical effect by favoring in-state economic interests over out-of-state economic interests. *Hughes*, 411 U.S. at 335–36. This occurs where a law or regulation "erect[s] a barrier against the movement of interstate trade." *Philadelphia*, 437 U.S. at 628. The party challenging the statute's validity carries the burden of proof. *Hughes*, 411 U.S. at 336.

1. Section (a) does not create economic protectionism by facially discriminating against out-of-state electric utility providers.

A state law is per se invalid under the dormant Commerce Clause only if it has a "direct and substantial" impact on interstate commerce. *S. Union*, 138 F.Supp.2d at 1206. There is no violation of the dormant Commerce Clause where a state regulation does not attempt to create "a direct economic benefit" for its own citizens over those from other States. *Id.* at 1207. Even laws or regulations aimed at benefitting the residents of a particular state are permissible under the dormant Commerce Clause so long as "the benefits are not achieved at the expense of a sister State." *Id.* Missouri enacted a statute that required all utility companies operating in the state to receive approval from the Missouri Public Service Commission before purchasing stock in other utility companies. *Id.* at 1203. The court upheld the Missouri statute and distinguished it from prior jurisprudence invalidating state laws that set price protections to benefit only in-state ratepayers. *Id.*

Similar to the statute at issue in *Southern Union Company v. Missouri Public Service Commission*, section 2(a) of the EDEA applies even-handedly to both in-state and out-of-state utility providers. The modification of Franklin's RPS under the EDEA requires that electric

distribution utilities incorporate certified biomass feedstock into their electricity supply for customers within Franklin. Energy Diversification and Expansion Act, § 2(a) (2016). The Franklin regulation does not implement price controls or set a price schedule for utility providers. *Id.* All electric distribution companies—both in-state and out-of-state—must comply with adding certified biomass feedstock. *Id.* at § 2(a)(4). Thus cases where the state law "imposes on out-of-state commercial interests the full burden" of the in-state benefit are easily distinguishable from the EDEA, which imposes the burdens of compliance equally on in-state and out-of-state entities. *Philadelphia*, 437 U.S. at 628. Therefore, section 2(a) of the EDEA does not facially discriminate against out-of-state electric power suppliers.

2. Section 2(a) does not discriminate in practical effect against out-of-state electric utility providers.

State laws that set non-price standards for products sold in-state "may be amendable to scrutiny under generally applicable *Pike* balancing or scrutinized for traces of discrimination under *Philadelphia*, but never near automatic condemnation under *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1935); *Energy and Environmental Legal Institute v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015). In, *EELP v. Epel*, the court considered whether Colorado's regulation that required fifteen percent of electricity sold to Colorado consumers come from renewable resources violated the dormant Commerce Clause. The effect of Colorado's law was to "regulate quality of goods sold to in-state residents," but it did not directly regulate price in-state or out-of-state. *Id.* at 1173. Overall, Colorado's regulation likely raised prices for only in-state consumers because every producer was equally hurt and those who complied were equally helped.

Section 2(a) of the EDEA has a similar practical effect as the Colorado statute in *Epel.* The requirement to incorporate at least fifteen percent of certified biomass feedstock from the Designated Biomass Growing Region only regulates the quality of the goods sold to the citizens

of Franklin. Energy Diversification and Expansion Act, § 2(a)(4) (2016). The practical effect of the regulation burdens both in-state and out-of-state electric utility producers. Therefore, section 2(a) is not per se invalid under the dormant Commerce Clause.

B. Section 2(a) does not violate the dormant Commerce Clause under the *Pike* balancing test.

If a state regulation does not blatantly set prices or discriminate against out-of-state producers, then the "near per se" rules do not apply. *Epel*, 793 F.3d at 1173–74. The Supreme Court determined in *Pike* that when a statute "regulates even-handedly to effectuate a legitimate local public interest, and effects on interstate commerce are only incidental, it will be upheld . . . ." 397 U.S. 137, 142 (1970). If a legitimate local public interest is found, then the "extent of the burden that will be tolerated will depend on the nature of the local interest involved and on whether it could be promoted as well with lesser impact on interstate activities." *Id.*

1. Section 2(a) effectuates a legitimate local public interest.

When *Pike* is applied, the question is whether the legislative objectives were credibly achieved through the regulation or whether they discriminated against interstate trade. *Id.* Thus a state law which achieves its legislative purpose through "illegitimate means of isolating the State from the national economy," will be stricken down. *Id.* at 627. Statutes that impose a burden explicitly on out-of-state commercial interests will likely violate the dormant Commerce Clause. *Id.* at 628.

The Franklin Legislature stated in the EDEA's preamble that the retirement of coal-fired generated plants threatens the availability of reliable electricity supply within Franklin. Energy Diversification and Expansion Act (2016). Integrating biomass energy into the fuel supply will provide substantial environmental and economic benefits for Franklin and will result in reduced

greenhouse gas emissions. *Id.* Similar to *Philadelphia*, the purpose of the EDEA to protect the environment and stabilize power prices is a legitimate public interest.

The EDEA, however, is distinguishable from statutes found to violate the dormant Commerce Clause. Section 2(a)(4) defines the "Designated Biomass Growing Region." The forests are located in both Franklin and parts of Vandalia. *Id.* at § 2(a)(4). The forests are easily accessible for both in-state and out-of-state energy producers. The Legislature's requirement for energy producers to use the designated biomass growing region achieves the state's interest in decreasing unemployment and protecting the environment. *Id.* Unlike the regulation at issue in *Philadelphia*, section 2(a)(4) does not completely prohibit the participation of out of state interests. The biomass requirements will likely increase prices on Franklin customers, but will not affect costs to out-of-state customers. The burden on interstate commerce is therefore minimal and does not "isolate the State from the national economy." *Philadelphia*, 437 U.S. at 627. For this reason, section 2(a) does not violate the dormant Commerce Clause by achieving a legitimate public local interest through illegitimate means.

2. Section 2(a) accomplishes the purposes of the legitimate State interest through the least burdensome impact on interstate activities.

Where a State's regulatory objective advance legitimate local purposes that could not be achieved through a reasonable nondiscriminatory alternative, a regulation that has an incidental impact on interstate commerce will not violate the dormant Commerce Clause. *See Heald*, 544 U.S. at 489. Only where State goals could be achieved without a discriminatory impact on interstate commerce will a law violate the dormant Commerce Clause. *See id.* at 491.

Section 2(a) does not violate the dormant Commerce Clause because it achieves a legitimate legislative purpose through the least restrictive means. The PJM capacity markets have failed to provide incentives to encourage the development of new generating capacity within the

mid-Atlantic region. Energy Diversification and Expansion Act (2016). Section 2(a)'s requirement applies even-handedly to achieve the State's interest, unlike the state regulations in *Heald*, which specifically burdened out-of-state wineries to accomplish legislative goals. Stabilizing power prices and reducing the environmental impact of the energy industry through the biomass feedstock requirement cannot be accomplished through a less burdensome alternative. Therefore, section 2(a) does not violate the dormant Commerce Clause.

IV. Section 2(b) of the Energy Diversification and Expansion Act is Constitutionally Valid Because It Does Not Violate the Dormant Commerce Clause.

As mentioned above, the dormant Commerce Clause applies to state laws that discriminate in favor of in-state entities and interests at the expense of out-of-state entities and interests. For the reasons discussed below, Section 2(b) of the EDEA is constitutionally permissible.

A. Section 2(b) is not facially discriminatory.

State laws and regulations that "'affirmatively' or 'clearly' discriminate[] against interstate commerce on [their] face or in practical effect" will not violate the dormant Commerce Clause where they are motivated by some "valid factor unrelated to protectionism." *C & A Carbone*, 511 U.S. at 402. A regulation is found to be facially discriminatory when it favors a single in-state entity and needlessly hinders the operation of out-of-state entities. *Id*. at 389.

The present case does not "clearly" favor in-state or "affirmatively" harm out-of-state electric generation facilities. The State of Franklin applies the same standards to both in-state and out-of-state facilities through Section 2(b). *See* Energy Diversification and Expansion Act § 2(b) (2016). Promoting on-site cogeneration energy generation is "a legitimate state interest," and any effect on interstate commerce is purely incidental and unintentional. *C & A Carbone*, 511 U.S. at 389. Although promoting local production will have a minor impact on the interstate market for power by lowering the demand for power in Franklin, this demand decrease will equally effect in-

state and out-of-state generators. Furthermore, the possibility that a statute favoring a type of power generator that is local in nature does not create a "clearly excessive" burden on interstate commerce because Section 2(b) does not prevent out-of-state entities from participating in Franklin's energy market. *Pike*, 397 U.S. at 142. And given that Congress favors cogeneration facilities, *see* 16 U.S.C. § 824a-3 (2012), any incidental impact such facilities may have on the interstate market are acceptable and consistent with federal policy.

1. Section 2(b) is justified by a non-protectionist purpose.

Franklin acted within its authority in exempting certain generation facilities from its RPS. These CHP and cogeneration facilities are not required to use certified biomass feedstock located in designated forests and are free to procure biomass from out-of-state sources. That Section 2(b) only applies to facilities that seek to provide customers with energy produced in part from non-fossil fuel sources only furthers legislatively expressed goals of providing renewable, sustainable, and reliable energy to the State of Franklin.

The closing of many coal plants and the inability of PJM to order new generation construction makes the stipulations in Section 2(b) not only reasonable but necessary in order to provide reliable electrical generation capacity. The renewable energy requirements, the customer side of the meter requirement, and the interconnectedness requirement enable bypassing the congested and inconsistent regional transmission facilities and will ensure that Franklin has diversified and reliable energy generation.

2. Section 2(b)'s purpose cannot be accomplished through less discriminatory means

It is essential for the State of Franklin's energy storage and usage needs that the transmission, congestion, and inconsistency of electricity be corrected. All three of Section 2(b)'s requirements for CHP and cogeneration facilities are required in order to accomplish this purpose. First, requiring increased use of renewable energy sources is the only way that Franklin will be

able to protect its environment while concurrently satisfying its current energy needs. The closing of coal plants and the inability of PJM to order new generation necessitates State action to ensure the availability of reliable electrical generation. Second, promoting localized generators like CHP and cogeneration facilities ensures that when there are energy supply shortages in PJM's market, there will be alternative, accessible, and on-site sources of power. Third, requiring the CHP and cogeneration facilities to connect to a utility's distribution grid dampens the harmful impact on Franklin's consumers of false price hikes and inconsistent supply. Each of these three requirements is absolutely necessary in order to ensure that the State of Franklin has diversified and reliable energy supply.

CONCLUSION

For the above reasons, this Court should reverse the court below on all four questions.

/s/ 17
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