C.A. No. 16-01234

United States Court of Appeals

FOR THE TWELFTH CIRCUIT

STATE OF FRANKLIN,
Appellant,

v.

ELECTRICITY PRODUCERS COALITION,
Appellee,

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

BRIEF OF APPELLANT STATE OF FRANKLIN

TEAM 1

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JURISDICTIONAL STATEMENT

The federal district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the claims arose under federal law, specifically the Supremacy Clause and the Commerce Clause of the U.S. Constitution. That court issued final judgment on November 7, 2016. Franklin filed its timely motion for appeal prior to January 6, 2017, and its appeal February 13, 2017. This appeal follows a final order of the district court, and this court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

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.

STATEMENT OF THE CASE

The State of Franklin has sought to provide economic stability and electric grid reliability to its' residents through the enactment of the Energy Diversification and Expansion Act (EDEA). Franklin is the nations' third largest coal producing state, and with the national shift away from coal-generated electricity towards renewable sources, Franklin is suffering substantial economic hardship.

The EDEA, in Section 1(a), seeks to ensure that coal-fired electric generation facilities within the PJM regions of Franklin East, Vandalia South, and Allegheny North remain economically viable through this national transition. Section 1(a) provides assistance to coal-fired generation plants through the Carbon Assistance Payments (CAP) program. This program falls within the congressionally delegated authority, through the National Power Act 16 U.S.C. § 824(b)(1), to the States to regulate generation facilities and its' economic viability. Furthermore, this assistance ensures Franklin's ability to meet electric capacity requirements, which are regulated by the Federal Energy Regulatory Commission (FERC).

The EDEA, in Section 2(a), in turn seeks to ensure Franklin keeps pace with the national movement towards renewable energy sources. This section sets mandates for electric generation facilities to secure a portion of its electricity through renewable resources. It accomplishes this goal in multiple ways but relevant to this case is its' restructuring of Franklin's Renewable Portfolio Standard (RPS) concerning biomass. Franklin seeks to harness this particular resource

because of its abundance in the region. Fostering a healthy biomass industry is beneficial not only to Franklin, but also the surrounding states. The restructure of the RPS fosters economic growth in an almost nonexistent industry while also ensuring grid reliability requirements are met.

The Electricity Producers Coalition (EPC) commenced an action against Franklin on July 1, 2016 in the Federal District Court for the Eastern District Court of Franklin alleging the Public Service Commission (PSC) of Franklin's implementation of the EDEA violates the Supremacy Clause and dormant Commerce Clause of the U.S. Constitution. The EPC sought a declaratory judgment that the CAP program, as implemented, is preempted by the FPA and falls within the purview of FERC, and the implementation of Franklin's new RPS violates the dormant Commerce Clause given its discriminatory impact on interstate commerce. The EPC also sought injunctive relief to prevent further implementation of the EDEA.

The Federal District Court largely agreed with the EPC's arguments and issued a summary judgment ruling on November 7, 2016 in favor of the EPC. In its ruling the Federal District Court found that Section 1 of the 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." R. at 12. The court also found that Section 1 of the EDEA is conflict preempted under the Supremacy Clause of the U.S. Constitution because through FERC's market based pricing scheme, the CAP program would "interfere with market signals" and "discourage potential investors from financing and building new economic generation." R. at 13.

Further, the court ruled that Section 2(a) is invalid under the dormant Commerce Clause of the U.S. Constitution because the geographic limitation of the "certified biomass feedstock" is

limited primarily to areas located within Franklin. R. at 13. Also, the court ruled Section 2(b) of the EDEA is invalid under the dormant Commerce Clause because of the geographic limitation of "eligible facilities" for the carve-out for customer-sited cogeneration facilities. The court stated, "...by its very nature [Section 2(b)] excludes the participation of energy providers outside of the state of Franklin." R. at 13. Franklin has now appealed this ruling.

STATEMENT OF THE FACTS

The State of Franklin enacted the Energy Diversification and Expansion Act (EDEA) in January 2016 in order to accomplish two goals. R. at 3. First, the legislation was a means of preventing the financial distress, and possible premature retirement, of a number of large coal plants within Franklin. *Id.* Second, the EDEA was intended to stimulate the development of a biomass industry within the State, shifting Franklin's electricity generation to a more environmentally sustainable and responsible composition. *Id.*

Due to a number of factors including stringent environmental regulations promulgated by the Environmental Protection Agency and market forces surrounding electricity generation, Franklin's large coal plants have suffered serious financial distress. *Id.* The geographic region encompassing Franklin has recently suffered the loss of significant electrical generation capacity due to the retirement of coal-fired generating plants. R. at 4. As such, the reliability of the electricity supply within Franklin is uncertain. *Id.* The PJM Interconnection, manager of the regional electric power grid serving Franklin, lacks the authority to order new electricity generation to assuage concerns involving the reliability of the supply. *Id.* Franklin suffers potential capacity deficiencies, due to the PJM capacity markets' failure to provide incentives to encourage the development of new generating capacity, or to allow existing coal-fired generation to continue operation. *Id.*

Franklin is the third-largest coal producing state in the country, and as such, the coal industry makes up a large portion of the State's economy. R. at 3. Due to the recent suffering of the coal plants, Franklin was concerned with the continued production of coal in order to meet the plants' fuel supply needs, the preservation of the employment of miners and other coal related workers' jobs, and the property tax revenues enjoyed by the communities in which the plants were located. *Id.* All of these factors, paired with the potential loss of attracting and retaining industrial and manufacturing jobs due to the threatened reliability of the electric generating system, led to Franklin's action in enacting the EDEA. *Id.*

In order to sustain the coal plants, the EDEA provides for financial incentives to eligible coal-fired generating plants serving Franklin. *Id.* These financial incentives come in the form of Carbon Assistance Payments (CAPs), and the Franklin Public Service Commission is charged by the legislation with determining power plant eligibility and setting the level of CAPs, in accordance with standards outlined in the EDEA. *Id.*

To be eligible for CAPs, the legislation provides that an electric generating plant must be located within the Franklin East, Vandalia South, or Allegheny North zones within the PJM operating region. R. at 6. The plant must also rely on coal as its primary fuel source, and must obtain at least ten percent of its coal from coal mines located in whole or in part within the state of Franklin. *Id.* Finally, the plant must require financial assistance to sustain its continued operations, based on a number of analyses and findings by the Public Service Commission, including the plant's projected energy, capacity and ancillary service revenues, and projected fuel and operating maintenance costs. *Id.*

In determining the price at which CAPs should be set, the EDEA provides that the Commission shall first take into account the incremental capital and operating costs associated

with coal-fired generating units as compared with competing sources of electricity. R. at 6, 7. Secondly, the Commission will evaluate the extent to which energy, capacity, and ancillary service revenues of eligible coal-fired generating plants are insufficient to allow for the plants' continued operation. R. at 7. Thirdly, the Commission will determine the impacts of the CAPs on ratepayers within Franklin. *Id.* Lastly, the Commission shall consider the public interest in determining the price at which CAPs are set. *Id.*

After much work on the part of the Franklin Public Service Commission, the Commission issued an EDEA Implementation Order in June 2016, including the identification of five coal-fired generating plants that met the prerequisites required by the legislation to be eligible for Carbon Assistance Payments. *Id.* The five eligible plants are comprised of three plants in the Franklin East zone, one plant outside the state of Franklin in the Vandalia South zone, and one plant within the Allegheny North zone of the State of Franklin. *Id.* Each of these plants has made a verifiable historic contribution to the electricity generating mix consumed by retail electricity customers within Franklin. *Id.* Based in part on the analysis of a power supply expert retained by the Franklin Public Service Commission, and within the requirements of the EDEA, for a ten-year contract period commencing September 1, 2016, the Carbon Assistance Payment was set at $18.50 per megawatt hour. R. at 7, 8.

As aforementioned, Franklin's implementation of the EDEA also served to stimulate the development of a biomass industry. R. at 3. With 77 percent of the state covered with forests, Franklin is the third most forested state in the country. *Id.* Residues produced during harvesting of forest products, fuel wood extracted from forestlands, and residues generated at primary and secondary wood processing facilities are able to provide sufficient feedstock to support a biomass industry. *Id.*

With a sustained biomass industry, Franklin would provide substantial environmental benefits, by way of reducing greenhouse gas emissions from electric generating resources. R. at 4. A biomass industry would also work to diversify the electric generating portfolio of Franklin, thereby reducing the volatility of power prices. *Id.* Biomass production would help ensure sufficient capacity and stabilize power prices, while creating employment opportunities in the energy sector. R. at 5.

In 2007, Franklin enacted a Renewable Portfolio Standard (RPS) requiring its five electric distribution companies to secure 20 percent of the electricity sold to retail customers from renewable sources by 2020, with that percentage increasing to 30 percent by 2030. R. at 8. Failure to comply with these standards will result in the payment of penalties. *Id.* Biomass is an eligible renewable energy resource for the purposes of Franklin's RPS. *Id.*

The EDEA modifies Franklin's existing RPS to include an additional requirement imposed on electric distribution utilities to procure three percent of their electricity supply for retail customers from electric generating plants fired with a fuel supply comprising coal and no less than fifteen percent certified biomass feedstock beginning in 2020. *Id.* This procurement obligation grows to five percent by 2030. *Id.*

The EDEA defines certified biomass feedstock as feedstock that is harvested from a forest identified by the Franklin Department of Natural Resources (DNR) and the Franklin Division of Commerce as a "Designated Biomass Growing Region." *Id.* A "Designated Biomass Growing Region" is defined as an area within the state of Franklin and the adjoining states, which contains biomass suitable for sustainable harvest and use as a feedstock for co-firing with coal to generate electricity. R. at 9. Biomass suitability is determined by the DNR's analyses concerning 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 other factors that the DNR deems reasonable in its discretion. *Id.* A "Designated Biomass Growing Region" must also be an economically depressed area, as determined by the Franklin Division of Commerce's analyses of labor and employment trends, unemployment rates, average income, and other factors that the Division of Commerce deems reasonable in its discretion. *Id.*

Following the enacting of the EDEA, the DNR and Division of Commerce identified two Designated Biomass Growing Regions through their combined efforts. *Id.* These regions include the Franklin-Allegheny State Forest, which covers 756 total acres, 506 within Franklin and 256 within Vandalia, and the Central Appalachian Forest, which covers 422 total acres, entirely within Franklin. *Id.* The former is comprised of three counties of which the unemployment rates are 9.7 percent, 12.3 percent, and 10.9 percent, respectively. *Id.* Those counties have suffered disproportionately from the downturn in the coal industry. *Id.* The latter encompasses two counties with unemployment rates of 14.6 percent and 9.8 percent, respectively, and those counties have also suffered disproportionately from layoffs associated with coal mine closures. *Id.* The Franklin-Allegheny State Forest features hardwood species particularly suited for biomass used for generating electricity, while the Central Appalachian Forest features softwood species that are particularly suited for the same purpose. *Id.*

The EDEA also modifies Franklin's existing RPS to include a carve-out for customer-sited combined heat and power (CHP) or cogeneration facilities fueled with biomass. R. at 4. The effect of such a carve-out is to require that 0.5 percent of the renewable energy required under the existing RPS be procured from customer-sited, biomass-fueled CHP facilities beginning in 2020. R. at 10. This procurement obligation grows to one percent by 2030. *Id.*

The development of such distributed energy resources (DERs) increases the resilience of the electric utility grid, reduces transmission and distribution costs, provides additional tools for customers to manage their energy costs, and ultimately results in lower energy costs for consumers. R. at 5. DERs fueled with sustainably harvested biomass reduce the environmental impact of the energy industry, and foster economic growth by stimulating the development of the above-mentioned biomass industry within Franklin. *Id.*

The Franklin Public Service Commission has primary authority over administration of the existing RPS, and was charged with making the necessary findings to implement the changes to the RPS included in the EDEA. R. at 10. The procurement obligation with respect to the carve-out does not require the fuel for eligible CHP facilities to be "certified biomass feedstock." *Id.* Because these facilities are required to be customer-sited, eligible CHP facilities by definition are located with Franklin's energy customers within the state of Franklin. *Id.*

SUMMARY OF THE ARGUMENT

Section 1 of the Energy Diversification and Expansion Act (EDEA) is not field preempted under the Supremacy Clause of the U.S. Constitution. The Supremacy Clause states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, § 2. As such, Federal laws may supersede, or preempt State laws. In determining whether a State law is preempted, courts typically start with the assumption that the State law is not preempted. Courts look to Congress' intent in enacting the Federal statute to determine whether the State law is superseded. A State law may be found to be field preempted where State law regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.

The Federal Energy Regulatory Commission (FERC) holds jurisdiction over the sale of electric energy and capacity at wholesale in interstate commerce. FERC's regulatory power is thereby limited, leaving the regulation of facilities used for the generation of electricity to the States.

Due to a number of factors including the financial distress of several large coal plants, the reliability of the State of Franklin's electricity supply became uncertain. The PJM Interconnection (PJM), manager of the regional electric power grid serving Franklin, lacks the authority to order new electricity generation. As such, the State was required to enact legislation in order to prevent the premature retirement of a number of Franklin's large coal plants, causing further uncertainty in the electricity supply.

The legislation enacted by the State is called the Energy Diversification and Expansion Act (EDEA). Section 1 of the EDEA provides for Carbon Assistance Payments (CAPs) to eligible financially struggling coal plants, and details the requirements for eligibility and the process of determining how CAPs are set.

Because Congress intentionally carved out a regulatory role for the States in the Federal Power Act (the Act granting FERC its regulatory powers), it is clear that the State of Franklin retains authority over its electricity generation facilities. The State of Franklin, through Section 1 of the EDEA, has not in any way regulated the price of electricity or capacity at wholesale, but has instead provided CAPs to generating facilities that are found to require financial assistance to remain in operation. The CAP program operates entirely independently from PJM's wholesale auction process by simply providing supplemental payments to a narrowly defined group of generators so that they may continue to provide capacity to the State of Franklin.

As such, Section 1 of the EDEA is not field preempted under the Supremacy Clause of the U.S. Constitution.

Similarly, Section 1 of the EDEA is not conflict preempted under the Supremacy Clause. State law is found to be conflict preempted where the law is in actual conflict with Federal law. If a court finds that State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the State law is conflict preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Because the aforementioned CAP program, established by Section 1 of the EDEA, operates independently from PJM's wholesale auction process, it has no effect on the market-based processes approved and overseen by FERC. Any *possible* impact on the market-based processes would be an incident of efforts to achieve the proper State purpose of regulating generation facilities. Such an incident of efforts to achieve a proper State purpose is exempted from conflict preemption. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989).

Additionally, because the eligible generating facilities recognized by the CAP program enacted by Section 1 of the EDEA will continue to operate within the PJM wholesale market, the market-based processes approved and overseen by FERC continue to be accomplished. The operation of the PJM wholesale market is not frustrated, and the provisions of the market are not refused their natural effect. As such, Section 1 of the EDEA is not conflict preempted under the Supremacy Clause of the U.S. Constitution.

The dormant Commerce Clause does not invalidate Section 2(a) of the EDEA because it does not discriminate against interstate commerce, and any purported incidental discrimination is substantially outweighed by the local public interests. Section 2(a) is not discriminatory on its

face, or by its effect, because it regulates evenhandedly across state boundaries. With this facially neutral determination the statute then survives a balancing test, which shows any incidental discrimination does not support the theory of economic isolationism our Framers were concerned with during the inception of the Commerce Clause in the U.S. Constitution.

Likewise, Section 2(b) of the EDEA passes constitutional muster. Even under the strict scrutiny standard applied to State statutes in dealing with facially discriminatory laws, Section 2(b), through the record, shows that it serves legitimate local interests by harnessing the unique benefits of cogeneration facilities. These public interests far outweigh any burden on interstate commerce Section 2(a) might have. Furthermore, Franklin in enacting Section 2(a) has legislated well within is powers promulgated under the FPA. Thus, Franklin acting within its congressionally delegated powers cannot run afoul of the dormant Commerce Clause.

ARGUMENT

I. This Court Employs a *De Novo* Standard of Review in Considering Constitutional Questions.

The U.S. District Court for the Eastern District of Franklin incorrectly granted the Electricity Producers Coalition's motion for summary judgment. The determination of Supremacy Clause and Dormant Commerce Clause violations are questions concerning the interpretation of the United States Constitution, over which this Court exercises *de novo* review. *See Air Trasp. Ass'n of Am. v. Cuomo,* 520 F. 3d 218 (2d Cir. 2008). Under a *de novo* standard of review, this Court owes no deference the lower court's Constitutional analyses. *Id.*

II. Section 1 of the Energy Diversification and Expansion Act, as Enacted by Franklin and Administered by the Franklin Public Service Commission, is Not Field Preempted Under the Supremacy Clause of the U.S. Constitution.

The Supremacy Clause of the Constitution provides in pertinent part that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ."

U.S. Const. art. VI, § 2. As such, Federal laws enacted by Congress may preempt or supersede State laws, either expressly or impliedly. *See Morales v. Transworld Airlines, Inc.*, 504 U.S. 374, 383 (1992).

The question of whether a state action is preempted by federal law is one of congressional intent. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208 (1985). In order to discern Congress' intent, the explicit statutory language, as well as the structure and purpose of the statute must be examined. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). In so discerning Congress' intent, 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).

Where Congress does not expressly state its intent, courts may find implied preemption by way of "field preemption," where state law regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). In order for such field preemption to be found, Congress' act must relate 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. *Id.*

A. The Regulatory Power of the Federal Energy Regulatory Commission is Limited to the Sale of Electric Energy and Capacity at Wholesale in Interstate Commerce

The Federal Energy Regulatory Commission (FERC) derives its power with respect to the sale of electric energy and the sale of capacity from the Federal Power Act. 16 U.S.C. § 824(b)(1) (2015). This power is "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). FERC's regulatory authority is therefore limited to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce . . . ." *Id.* This statutory language leaves to the States all

regulatory authority over retail sales to end-use consumers, such as residents and local businesses.

FERC, according to the Federal Power Act, has no jurisdiction "over facilities used for the generation of electric energy . . . ." 16 U.S.C. § 824(b)(1) (2015). That regulatory authority, too, is left to the States.

B. The Energy Diversification and Expansion Act Was Lawfully Enacted as a Means of Preventing the Financial Distress of a Number of Large Coal Plants Within Franklin

The reliability of Franklin's electricity supply is uncertain, due to a number of factors including the serious financial distress of the State's coal plants. The manager of the regional electric power grid serving Franklin is the PJM Interconnection (PJM). PJM, an Independent System Operator (ISO), is an independent, non-profit entity, which operates a competitive wholesale electricity market in accordance with tariffs approved by FERC. PJM organizes auctions for buyers to procure capacity, but lacks the authority to order new electricity generation. As such, in order to prevent the premature retirement of a number of Franklin's large coal plants, causing further uncertainty in the electricity supply, the State realized that legislation would be required.

The State's solution was the Energy Diversification and Expansion Act (EDEA). An important part of the Act is the establishment of Carbon Assistance Payments (CAPs), which are tailored to provide for financial incentives to eligible coal-fired generating plants as a means of curbing some of the financial distress suffered by those plants. Section 1(a)(6) of the EDEA defines plant eligibility and provides as follows:

> "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 [Public Service] 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.

Eligible facilities qualify to receive CAPs, which are calculated pursuant to a number of factors by the Franklin Public Service Commission (PSC). Section 1(a)(2) of the EDEA determines the price at which CAPs should be set, and provides the following:

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

In June 2016, Franklin's PSC issued an EDEA Implementation Order, which identified five coal-fired generating plants that met the eligibility requirements of Section 1(a)(6). Based upon the stipulations of Section 1(a)(2), for a ten-year contract period commencing September 1, 2016, the PSC set the CAPs at $18.50 per megawatt hour.

C. The CAP Program is Not Field Preempted by the Federal Power Act

The Appellee contends that Section 1 of the EDEA, which establishes the CAP program and enforces the above standards, is field preempted by the Federal Power Act, and therefore violates the Supremacy Clause of the U.S. Constitution. The State of Franklin asserts that the CAP program falls well within state authority to regulate generation facilities and retail electric prices.

In *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, a pipeline company argued that a regulation governing the timing of production of natural gas violated the Supremacy Clause of the U.S. Constitution because it intruded upon FERC's jurisdiction under the Natural Gas Act (NGA). 489 U.S. 493, 506 (1989). The Supreme Court explained that the NGA, however, also

expressly carves out a regulatory role for the States. *Id* at 507. In discerning Congress' intent with respect to the NGA, the Court paid close attention to the fact that Congress carefully divided up regulatory power over the natural gas industry. *Id* at 510. The Court explained that Congress went so far in the legislation as to not only describe the reach of the federal power, but also to describe the areas that the power was not to extend. *Id.*

In considering whether Kansas, the State actor involved, had "moved into a field that Congress has marked out for comprehensive and exclusive federal control," the Supreme Court explained that it "naturally must remember the express jurisdictional limitation on FERC's powers contained in . . . the NGA." *Id* at 511-12. The Court, based in part upon this clear division of regulatory power between FERC and the States, ultimately held that the legislation was not field preempted, and therefore did not violate the Supremacy Clause of the U.S. Constitution. *Id* at 526.

Like the Natural Gas Act, the Federal Power Act provides an explicit division of regulatory power between FERC and the States. While FERC retains jurisdiction over the sale of electric energy and capacity at wholesale, the State holds authority over retail sales for facilities used for the generation of electric energy. 16 U.S.C. § 824(b)(1) (2015). The CAP program instituted in Section 1 of the EDEA falls well within this State regulatory authority.

In *PPL Energyplus, LLC v. Nazarian*, the United States District Court for the District of Maryland considered, among other issues, a Supremacy Clause violation by way of field preemption. 974 F. Supp. 2d 790 (D. Md. 2013). In that case, the Maryland Public Service Commission issued a Generation Order that directed a number of electric companies to enter into a "Contract for Differences" with CPV Maryland, LLC, an electric power generation development and asset management company, which was tasked with the construction and

operation of a power plant. *Id* at 796. This "Contract for Differences" essentially provided that regardless of the price set by the federally regulated wholesale market, the Maryland utilities would assure that CPV Maryland, LLC, received a guaranteed price, fixed by a contractual formula. *Id.*

According to that opinion, the State of Maryland began experiencing potential electricity generation resource deficiencies in the late 1990s/early 2000s. *Id* at 816. This resulted in a need for additional generation assets within the state, and the ultimate ordering of the Generation Order. *Id* at 820.

The field preemption claim in that case arose from the potential invasion of a field occupied exclusively by FERC (the regulation of wholesale energy and capacity sales, including the price at which such sales are made). *Id* at 825. After much discussion, the court concluded that the Maryland Public Service Commission's "actions and objectives of securing the construction and operation of a generation facility may not invade a federally occupied field and most likely do fall within the permissible realm of regulation reserved to the states under the [Federal Power Act]." *Id* at 840. However, that court continued, explaining that because, through implementation of the Generation Order, CPV Maryland, LLC was guaranteed to receive the contract price for its wholesale energy and capacity sales, the Generation Order set or established the ultimate price received by the company for wholesale energy and capacity sales. *Id.* The court held that the Generating Order was field preempted, and therefore, a violation of the Supremacy Clause. *Id.*

While similarities exist with respect to the motivations behind the State action, the facts of the present case deviate from that of the *Nazarian* case. Most importantly, instead of establishing a "Contract for Differences" that establishes a price for wholesale energy and

capacity sales, Section 1 of the EDEA merely offers CAPs to generating facilities that are found to require financial assistance to remain in operation. The CAP program operates entirely independently from PJM's capacity auction process by simply providing supplemental payments to a narrowly defined group of generators so that they may continue to provide capacity to the State of Franklin.

The court in *Nazarian* explained that if the Generating Order had merely secured the operation of a generation facility, as does the CAP program, the action would not have invaded the federally occupied field, and would have instead fallen within the realm of regulation reserved to the States. *Id.* Even the action taken by the Maryland Public Service Commission, which surpasses that of the Franklin PSC, leaves "debatable issues as to whether the Generation Order violated the Supremacy Clause by virtue of . . . field[] preemption," according to the court. *Id* at 841.

In *PPL Energyplus, LLC v. Hanna*, a case with facts very similar to that of *Nazarian*, the United States District Court for the District of New Jersey considered a field preemption claim where the State of New Jersey also devised a contractual means for the construction of new generation facilities within that state. 977 F. Supp. 2d 372, 393 (D.N.J. 2013). Similarly to that of *Narzarian*, the court in *Hanna* found such a scheme to be field preempted. *Id* at 412. Again, in *Hanna*, contracts were formed so as to affect wholesale energy and capacity sales, unlike the EDEA's CAP program.

The CAP program implemented by Section 1 of the EDEA does not affect the sale of electric energy or capacity at wholesale in interstate commerce. Instead, it provides financial incentives to a narrowly defined group of existing generators in order to ensure their continued

operation. The CAP program operates completely independently of the PJM capacity auction process, and confirms the availability of capacity within the State of Franklin.

Because of the clear division of regulatory power in the Federal Power Act, FERC has "no jurisdiction over facilities used for the generation of electric energy," and the CAP program established by the EDEA affects only those facilities. 16 U.S.C. § 824(b)(1) (2015). Since the regulation of such facilities is left to the States, the Federal interest cannot be seen as so dominant as to preclude enforcement of State laws with respect to the matter. Section 1 of the EDEA is not field preempted under the Supremacy Clause of the U.S. Constitution.

III. Section 1 of the EDEA, as Enacted by Franklin and Administered by the Franklin PSC, is Not Conflict Preempted Under the Supremacy Clause of the U.S. Constitution.

Another form of implied preemption can occur when a State law is in actual conflict with Federal law. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Such conflict preemption may be found where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As with field preemption, Congress' intent must be discerned, and in so doing, 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).

A. The Preferred Market-Based Processes Approved and Overseen by FERC are Unaffected by the EDEA's CAP Program, or if Affected, Only As an Incident of Efforts to Achieve a Proper State Purpose

As discussed above, FERC regulates wholesale electricity markets through its employ of Independent System Operators, such as PJM, the ISO that serves the State of Franklin. ISOs, including PJM, operate wholesale electricity and capacity markets with tariffs approved by FERC. These markets generally run through single-price clearing auctions in which generators submit offers to sell quantities of energy, and buyers submit offers to pay. Such buyers include

electric distribution utilities selling electricity to ratepayers. ISOs compute the clearing price where supply intersects with demand, then accept buyers' bids above the clearing price and sellers' offers below the clearing price.

As discussed at length above, the regulation of facilities used for the generation of electricity is a power retained by the States. According to the Supreme Court in the aforementioned *Nw. Cent. Pipeline Corp.* case, State law should be preempted where "a state regulation's impact on matters within federal control is *not* an incident of efforts to achieve a proper state purpose." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989) (emphasis added). The CAP program established by Section 1 of the EDEA has no effect on the market-based processes approved and overseen by FERC, as the program operates entirely independently from the PJM wholesale market. Any *possible* impact on the market-based processes would be an incident of efforts to achieve the proper State purpose of regulating generation facilities.

B. The CAP Program Does Not Create an Obstacle in Achieving the Full Purpose and Objectives of Existing Federal Law

In determining whether an obstacle in achieving the full purpose and objectives of existing federal law has been created by State law the Supreme Court employed the following standard in *Savage v. Jones*:

> If the purpose of the act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect – the state law must yield to the regulation of Congress within the sphere of its delegated powers.

225 U.S. 501 (1912).

Because the eligible generating facilities recognized by the CAP program enacted by Section 1 of the EDEA will continue to operate within the PJM wholesale market, the market-

based processes approved and overseen by FERC continue to be accomplished. The operation of the PJM wholesale market is not frustrated. The provisions of the market are not refused their natural effect.

This, paired with the idea that the only possible impact on the market-based processes approved and overseen by FERC would be an incident of efforts to achieve a proper State purpose, lead to the conclusion that Section 1 of the EDEA is not conflict preempted under the Supremacy Clause of the U.S. Constitution.

IV. Section 2(a) of the EDEA, as Enacted by Franklin, Regulates "Certified Biomass Feedstock" Based on its Suitability for use in Co-fired Electricity Generation Facilities, Rather than State Boundaries.

The Commerce Clause of the U.S. Constitution provides that "the Congress shall have Power... to regulate Commerce... among the several States...." U.S. Const. art. I, § 8, cl. 3. Along with this affirmative grant of power to Congress, the negative aspect has long been recognized to limit the power of States' ability to regulate against interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). This negative, or dormant, aspect of the Commerce Clause has been recognized, by the Court, as keeping with the Framer's intent that a successful Union needs to avoid economic Balkanization, or isolationism by the States. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). When a States' statue is clearly discriminatory against interstate commerce it will be invalidated. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). However, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

A. Section 2(a) of the EDEA, in its Regulation of "Certified Biomass Feedstock", is Neutral on its Face, and in its Effect.

Determining whether a statute facially discriminates has been characterized by a simple method. Does the statute apply "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter[?]" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Further, if the statute in its effect proves to provide differential treatment benefitting the state at the expense of other states it will be found "*per se* invalid." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n,* 489 U.S. 493, 523 (1989).

Here, it would seem the facial discrimination analysis is simple. The EDEA by its plain language directs its relevant state agencies to consider an "area within the state of Franklin and the adjoining states" for the designation of "certified biomass feedstock." R. at 9. Thus, by its language the statute is non-discriminatory given Franklin has not limited itself as the only state capable of producing "certified biomass feedstock." Further, in its effect, an area encompassing Franklin and an adjoining state was approved by the agencies to be classified as "certified biomass feedstock." R. at 9. The plain language of the statute and the effect, clearly show Franklin lacks the necessary isolationist language, or effect, required to determine the EDEA is facially discriminatory.

B. Section 2(a) of the EDEA, Falls Within the Bounds of the Factor Test Described in Pike v. Bruce Church.

With the neutrality of the statute determined, the analysis shifts to the factors described in *Pike.* So long as the statute "regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Pike at 142. The evenhandedness of the statute has been demonstrated in its language by not displaying a preference to Franklin. Therefore, the crux of the test falls upon whether the burden on interstate commerce is clearly excessive compared to the putative local benefits.

The burden on interstate commerce, here, is at best minimal. To put it in perspective, the EDEA's modification of the RPS is that 20% of energy produced in Franklin is from renewable sources by 2020, and 30% by 2030. R. at 8. Within that 20% and the later 30% renewable standard, only five percent is required to be procured from electric generation facilities that co-fire coal and biomass. R. at 8. These co-fired facilities then only have a requirement to co-fire at least 15% "certified biomass feedstock." R. at 8. Thus, 75% of biomass used in these facilities has no requirement whatsoever. Furthermore, the record is silent as to what percentage these co-fired plants were already procuring from areas now classified as a "designated biomass growing region." Thus, any burden placed incidentally on interstate commerce at the outset would appear to be extremely low.

The putative local benefits of fostering a biomass industry, providing new jobs where there is scant availability, providing power grid reliability, and expanding Franklin's renewable portfolio (R. at 4, 5) far and away exceed the burden that may be caused on interstate commerce. Even if these local benefits could in some way be construed to be co-equal to the alleged interstate burden, it is not "clearly excessive" as the *Pike* test demands for a finding of invalidity.

Therefore, section 2(a) of the EDEA is not facially discriminatory, and following the factor test described in *Pike,* any incidental burden on interstate commerce is not clearly excessive in nature. Thus, section 2(a) of the EDEA passes constitutional muster as it relates to the dormant Commerce Clause.

C. Alternatively, Even if Section 2(a) of the EDEA in its Regulation of "Certified Biomass Feedstock" is Discriminatory in Effect, it Serves a Legitimate Local Interest that Cannot be Achieved by any Reasonable Alternative means.

If a statute is found to be discriminatory in its effect, the burden will shift to the State to show that there is a legitimate public interest, which cannot be served by reasonably alternative means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

1. *Franklin has a Legitimate Local interest in Section 2(a) of the EDEA.*

To find the legitimate local interest in Section 2(a) of the EDEA one need look no further than the legislative findings. Those findings demonstrate that: the increased usage of biomass will lower greenhouse emissions, diversify the electricity generating portfolio, reduce volatility of the energy market, diversify the local economy by fostering a biomass industry in the region, and ensure the reliability of grid for the future. R. at 4, 5. These findings within the record are not contradicted, and all serve as a substantial showing of local public interest.

2. *Franklin's Legitimate Local Interest Could not be Served Reasonably by an Alternate Means.*

The record before this court is silent on any reasonable alternative means for accomplishing Franklin's legitimate local interests. To this point, Franklin has yet to find a reasonable alternative to Section 2(a). With no evidence to the contrary, there must be no reasonable alternative. If there were, the EPC would have presented some evidence on the record to that effect. Furthermore, had there been such reasonable alternatives available, the district court would have issued a ruling with such findings.

Therefore, due to the weight of the evidence currently in this record, Franklin has demonstrated a legitimate public interest in the enactment of Section 2(a) of the EDEA and without any evidence to the contrary, there is no reasonable alternative to accomplishing

Franklin's legitimate interests. Thus, Section 2(a) of the EDEA even passes dormant Commerce Clause strict scrutiny review if it were determined to be facially discriminatory.

V. Section 2(b) of the EDEA Serves a Legitimate Local Purpose, by Carving out a Portion of Retail Electricity Supply for Customer-sited Cogeneration Facilities, which falls Squarely Within Franklin's Regulatory Power Under the FPA, and cannot be Reasonably Achieved by Other Means, thus Section 2(a) does not Offend the Dormant Commerce Clause.

The Commerce Clause of the U.S. Constitution provides that "the Congress shall have Power... to regulate Commerce... among the several States...." U.S. Const. art. I, § 8, cl. 3. Along with this affirmative grant of power to Congress, the negative aspect has long been recognized to limit the power of States' ability to regulate against interstate commerce. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). This negative, or dormant, aspect of the Commerce Clause has been recognized, by the Court, as keeping with the Framer's intent that a successful Union needs to avoid economic Balkanization, or isolationism by the States. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

However, this limitation is not absolute, and "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted). If a statute is shown to be discriminatory either on its face, or in effect, on interstate commerce, the burden falls to the State to show the statute "serves a legitimate public purpose" and that the "purpose could not be served as well by available nondiscriminatory means." *Id.*

A. The "Carve-out" for Customer-sited Cogeneration Facilities in Section 2(b) of the EDEA Serves a Legitimate Local Interest.

In *Maine*, the Commerce Clause issue centered around a ban on the importation of living baitfish. *Maine* at 133. The statute was clearly facially discriminatory because it banned all imports of living baitfish and thus fell under the strict scrutiny test outlined in *Hughes v.*

Oklahoma. Maine at 138. The state produced evidence in the District Court that demonstrated parasites accompanying living baitfish introduced into Maine's wildlife posed a significant risk to Maine's fisheries. *Maine* at 141. Due to the underdevelopment of scientific sampling techniques on the importation of living baitfish, the Court ruled that the foundation of Maine's ban on the importation of living baitfish was a legitimate local purpose with no reasonable alternative means. *Maine* at 152.

Similar to *Maine*, the record demonstrates that section 2(b) of the EDEA, in its effect is discriminatory against interstate commerce. R. at 10. ("[E]ligible [cogeneration] facilities by definition are located exclusively within the state of Franklin."). Therefore, the analysis is limited to a showing of a legitimate state purpose that cannot be achieved reasonably by another mechanism. *See Maine* at 138. The legislative intent demonstrates that Franklin has legitimate purposes in enacting a "carve-out" for biomass fueled, customer-sited cogeneration facilities. These purposes include: improved resilience of the electric utility grid, reduced transmission and distribution costs, and increasing the ability of customers to manage their energy costs. R. at 5. Most striking is the improved resilience of the electric utility grid. Cogeneration facilities have been proven to be one of the most efficient sources of energy available. *See Combined Heat and Power (CHP) Partnership,* Environmental Protection Agency, https://www.epa.gov/chp/chp-benefits (last visited February 11, 2017). The ability to draw from one fuel source, in this case biomass, to produce electricity while also providing heating and cooling capabilities has proven to be supremely efficient as well as environmentally friendly. *Id.* Thus, a legitimate local purpose exists.

B. The "Carve-out" for Customer-sited Cogeneration Facilities in Section 2(b) of the EDEA Cannot be Achieved by any Reasonably Alternative Means.

The "carve-out" for the purchase of electricity from these types of facilities is only limited to retail distribution companies at a procurement rate of 0.5 percent by 2020 and 1.0 percent by 2030. R. at 10. Without this "carve-out" retail distribution companies will likely continue to ignore the potential market created by these unique cogeneration facilities. This miniscule requirement of securing a small portion of distributable electricity by retail companies is the only effective way to encourage the use of the unique benefits cogeneration facilities offer. The only other means to take advantage of this unique opportunity would be to require a more significant percentage of procurement from cogeneration facilities.

In conclusion, the "carve-out" for customer-sited cogeneration facilities provides legitimate public purposes to Franklin. Further, the stated purposes cannot be achieved by any other reasonable means, and as such, Section 2(b) of the EDEA passes constitutional muster for the dormant Commerce Clause.

C. Additionally, the "Carve-out" for Customer-sited Cogeneration Facilities Falls within the Regulatory Power Granted to Franklin Under 16 U.S.C. § 824(b)(1) of the FPA.

"When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174, (1985).

"The Commission... shall not have jurisdiction... over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). The plain language of the FPA makes clear Franklin, the State, retains the regulatory authority over electricity generation, local distribution, and wholly intrastate transmissions of electricity. *Id.*

The Court has ruled in previous cases concerning the purpose for the FPA, providing that Commerce Clause issues related to 16 U.S.C. § 824(b)(1) will be heard on the merits. *See New Eng. Power Co. v. N.H.*, 455 U.S. 331, 341(1982) (Ban on exportation of hydroelectricity); *See also Wyoming v. Oklahoma*, 502 U.S. 437, 112 S. Ct. 789 (1992) (10% carve-out for Oklahoma produced coal). However, the generic prohibition outlined by these cases cannot be reconciled with the facts presented related to Section 2(b) of the EDEA.

Section 2(b) of the EDEA only regulates local distributors to acquire a small portion of their electricity from biomass customer-sited cogeneration facilities. R. at 10. Further, these cogeneration facilities have been identified by definition as wholly intrastate entities. R. at 10. By only regulating local distribution and facilities that by definition only provide electricity within the state, Franklin has acted with the authority granted it by the FPA. Congress has plainly authorized the States to regulate local distribution and "wholly intrastate transmissions of electricity." 16 U.S.C. § 824(b)(1). The issues in *New Eng. Power Co.* and *Wyoming* are clearly not present.

In *New Eng. Power Co.*, New Hampshire sought to restrict the interstate trade of hydroelectricity produced within the state. Similarly, in *Wyoming*, Oklahoma sought to restrict the flow of interstate dealings in coal. Here, Franklin seeks to restrict nothing and only promote one of the most efficient forms of electricity generation. When a State acts within the apparent authority it has been granted under the FPA, it seems counterintuitive to describe that action as being invalid under the dormant Commerce Clause.

Therefore, although the Court has ruled that 16 U.S.C. § 824(b)(1) may not be used as a defense to a dormant Commerce Clause action, the facts of this case provide that an exception to that generic rule must be carved out. When a State acts squarely within the bounds of the FPA,

that action cannot be subject to the scrutiny of a dormant Commerce Clause claim. And if the States' action falls within the bounds of 16 U.S.C. § 824(b)(1), it must be upheld.

CONCLUSION

For the reasons set forth above, Franklin respectfully request this court to 1) reverse and vacate the District Court's ruling, and 2) issue a ruling stating that no portions of Section 1 of the EDEA are "field preempted" or "conflict preempted" under the Supremacy Clause of the U.S. Constitution and no components of Section 2 of the EDEA violate the dormant Commerce Clause of the U.S. Constitution.

Respectfully submitted,
February 13, 2017

TEAM 1

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing the State of Franklin 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. 1