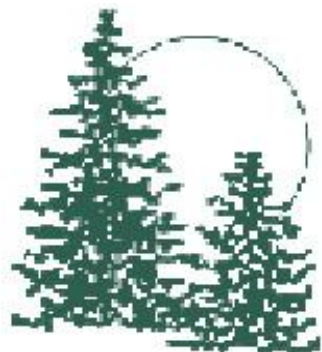


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Commerce Clause Issues Raised in State RPS

Carolyn Elefant
Law Offices of Carolyn Elefant
Washington, DC



ED HOLT
& Associates, Inc.

Energy Smart Consulting

28 Headland Road
Harpwell, ME 04079
Tel. 207.798.4588
Fax 207.798.4589
edholt@igc.org

Background

- Lawsuit filed by TransCanada Power Marketing in US District Court in Massachusetts alleged that a requirement for long-term contracting limited to in-state generators was in violation of the Commerce Clause of the US Constitution
 - ▶ A second violation was alleged based on the requirement that eligibility for the solar carve-out was limited to in-state generators
- Commerce Clause issues pertaining to RPS have also been raised recently in California and New Jersey

Purpose

- Examine existing state RPS laws and rules
- Explain and evaluate Commerce Clause challenges
- Offer guidance and options to states to avoid Commerce Clause restrictions

What is the Commerce Clause?

- Empowers Congress to “regulate commerce among the several states”
 - ▶ As interpreted by federal courts, states are also restricted from unjustifiably discriminating against or burdening the interstate flow of commerce (the dormant Commerce Clause)
- Prohibits economic protectionism
 - ▶ i.e., regulatory measures designed to benefit in-state economic interests by burdening out of state competitors

RPS Policies Favoring In-State-1

- Eligibility rules emphasize locally abundant resources
 - ▶ NC swine waste set-aside; MD Tier I poultry litter
- In-state multipliers
 - ▶ CO and MO offer 1.25x credit for in-state resources
- Priority for in-state resources
 - ▶ IL: in-state, then adjoining states, then other states if insufficient cost-effective resources
 - ▶ MD: owners of in-state solar systems must first offer solar RECs to in-state utilities
- Limits on out-of-state RECs
 - ▶ MI: eligible generators must be in-state or in the out-of-state service territory of a utility serving customers in Michigan
 - ▶ OH: min 50% of compliance must be in-state
 - ▶ NC and CA: min 25% must be from in-state resources

RPS Policies Favoring In-State-2

- Energy delivery requirements
 - ▶ MA, CT, RI, NH, ME: out-of-region generators must meet real-time energy delivery requirements into ISO-NE; must be in adjacent control area (except Maine)
 - ▶ PA: in-region requirement, where region is defined by PJM and MISO; MISO generator eligibility is limited to corner of PA
 - ▶ AZ: out-of-state generators must deliver energy to utilities
- Dedicated transmission requirements
 - ▶ TX: energy must be physically metered and verified in Texas; may not be commingled with non-renewable sources before being metered
 - ▶ NV: eligible facilities must be connected to a provider of electric service, and line may be shared with not more than one facility using nonrenewable energy

RPS Policies Favoring In-State-3

- Long-term contracting limited to in-state resources
 - ▶ MA and RI: requires long-term contracts with newly developed in-state projects
 - ▶ ME: requires long-term contracts with lowest price resources; in-state is included in priorities for consideration
- In-state DG or solar carve-outs
 - ▶ AZ: DG that is “located at a customer’s premises” and that displace conventional energy resources “that would otherwise be used to provide electricity to Arizona customers.”
 - ▶ MD: solar must be “connected with the electric distribution grid serving Maryland”
 - ▶ NJ: eligible SRECs must be “generated by a facility connected to the distribution system in this State.”

Commerce Clause: Screening Test

- Is the state law discriminatory on its face?
 - ▶ If YES, law is *per se* invalid unless there are no alternative means for the state to accomplish its goals. (“*per se*” test)
 - ▶ If NO, statute may still burden commerce. Courts apply “Pike balancing test” and weigh burdens to commerce against nature of state's interest

Discriminatory or Neutral?

- Example of “facially discriminatory” requirement:
 - ▶ Location-based RPS eligibility
- Example of facially neutral requirement:
 - ▶ Delivery-based RPS eligibility

Motivation Matters

- What are “permissible” state interests in Commerce Clause analysis?
 - ▶ Environmental health
 - ▶ Diversity of energy supply and conservation
 - ▶ Reliability and safety
- What are NOT permissible state interests?
 - ▶ Financing in-state projects
 - ▶ Economic development
 - ▶ Any other protectionist interests

Commerce Clause Exception

- Market Participant Rule
 - ▶ When a state participates in a market, it can favor its own facilities or resources
 - ▶ To be considered a market participant, state must own or directly fund the activity
- Do REC programs fit the market participant exception?
 - ▶ Probably not because they are regulatory in nature

Surviving the Commerce Clause

- What programs are likely to survive Commerce Clause scrutiny?
 - ▶ RPS eligibility based on delivery-requirements (facially neutral, necessary for states to capture environmental benefits of RPS)
 - ▶ Distributed generation carve-outs
 - Delivery or distribution interconnection requirements ensure states get DG and reliability benefits
 - Without RPS carve-out, utilities unlikely to include DG in portfolios - RPS may be only means to encourage DG

General Guidance to States

- Adopt facially neutral statutes (many discriminatory laws can be re-cast as neutral)
- Articulate legitimate state benefits in enabling language
- Consider programs that fall within exemptions
- Allow transitions for new RPS requirements to avoid undue burdens or ancillary issues that can trigger lawsuits (e.g., allow for grandfathering, apply requirements prospectively)
- Evaluate carefully market participant doctrine (more flexibility where states play active role in ownership of renewable plants or RECs)
- Take comfort that only one legal court challenge has been brought to date

Massachusetts Case Study

- 2008 Green Communities Act requires long-term contracts to “facilitate the financing of renewable energy generation within the jurisdictional boundaries of the [C]ommonwealth, including state waters, or in adjacent federal waters.”
 - ▶ Dec 2009: DPU adopted rules
 - ▶ Jan 2010: Utilities issued RFP
 - ▶ April: TransCanada filed complaint: limiting eligibility for long-term contracts to in-state projects is a violation of the Commerce Clause
 - ▶ June: TransCanada requested injunction to prevent signing or approving contracts
 - ▶ June: DPU suspended the requirement for in-state resources and issued emergency rules
 - ▶ July: DPU approved revised RFP
- In-state requirement was eliminated
 - ▶ September: Utilities issued revised RFP
 - ▶ Both parties requested stay until next May (stay granted Sep 30)

Conclusions

- Legal analysis suggests that some RPS statutes might be at risk, but at the same time, states have many options to avoid commerce clause challenges
- Legal challenges have been limited
 - ▶ Parties must have a lot of money at stake and be placed at a significant competitive disadvantage
 - ▶ Small projects are unlikely to support a legal challenge unless a developer can't otherwise participate in the state market

The Commerce Clause prevents states from creating protectionist barriers to interstate trade.... Discrimination under the Commerce Clause means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter, as opposed to state laws that regulate evenhandedly with only incidental effects on interstate commerce.... [A] discriminatory law is virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.... The state bears the burden of showing legitimate local purposes and the lack of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard.

Acknowledgments

Co-author Carolyn Elefant
Law Offices of Carolyn Elefant,
Washington DC
(202) 297-6100

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