



THE COMMERCE CLAUSE AND IMPLICATIONS FOR STATE RENEWABLE PORTFOLIO STANDARD PROGRAMS

CLEAN ENERGY STATES ALLIANCE
STATE RPS POLICY REPORT

by
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Background

- Lawsuit filed by TransCanada Power in US District Court in Massachusetts, alleging two Commerce Clause violations:
 - Requirement for long term contracting limited to in-state generators
 - Requirement that eligibility for solar carve-out was limited to in-state generators



Purpose

- To provide an overview of the Commerce Clause issues that may affect state RPS programs
- To identify options for states to structure RPS programs in a constitutionally compliant manner that allows states to retain benefits of RPS programs.

I. COMMERCE CLAUSE LEGAL ANALYSIS

Commerce Clause

- The Commerce Clause empowers Congress to regulate commerce...among the several states.
- As interpreted by courts, Congress' exclusive power prohibits states from interfering with commerce - a concept referred to as the "**dormant** commerce clause."
- As a practical matter, the dormant Commerce Clause prohibits economic protectionism.

Commerce Clause Legal Analysis

Is the state law
discriminatory on its
face?

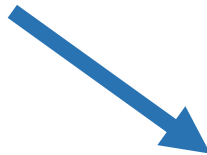
YES



Per se invalid



NO



**Burden to
commerce**

**Nature of state
interest**

PIKE BALANCING TEST

Commerce Clause Legal Analysis

- Facially discriminatory requirement:
 - Impossible for out-of-state interest to satisfy it
 - E.g., location-based RPS eligibility
- Facially discriminatory requirements are *per se* invalid
 - One exception: if no other alternatives exist
 - Supreme Court invoked this exception only once in *Maine v. Taylor*.

Commerce Clause Legal Analysis

- Facially neutral requirement
 - Both in-state or out-of-state entities can meet the requirement OR
 - In-state and out-of-state equally burdened
- Facially neutral requirements can violate Commerce Clause, so courts must apply *Pike* balancing and examine:
 - Extent of burden on commerce
 - Nature of the state's interest

Commerce Clause Legal Analysis

- What are “permissible” state interests in Commerce Clause analysis?
 - Environmental health
 - Diversity of energy supply and conservation
 - Reliability and safety
- What are impermissible interests?
 - Economic protectionism
 - In-state economic development

Commerce Clause Legal Analysis

- Market Participant Rule: Exception to Commerce Clause
- Under market participant rule, when a state participates in a market, it can favor its own resources
 - State must own or directly fund the activity to fit in the market participant exception
 - Most REC programs may not fit market participant exception
 - States don't contribute their own money
 - Programs are regulatory in nature

Commerce Clause Legal Analysis

- Categories of programs likely to survive Commerce Clause scrutiny:
 - Facially neutral eligibility requirements based on delivery to a state
 - Applies equally to in-state and out-of-state
 - DG carve-outs
 - Strong state interest in environment, reliability, avoiding additional transmission, diversity
 - No other real alternatives to RPS for encouraging DG (even funding DG won't compel utility to integrate it into its system)

II. OPTIONS FOR STATE RPS PROGRAMS

1. Craft facially neutral eligibility requirements

- Base RPS eligibility on functional, not locational criteria:
 - Project's ability to interconnect to in-state distribution
 - Delivery of power in-state
 - Displacement of power in-state
- Enhanced RPS compliance credit to projects that employ indigenous renewables that state seeks to develop

2. Employ Resource-based Eligibility Requirements

- Resource-based requirements are facially neutral but allow state to support in-state technologies:
 - Maryland - poultry litter included in list of Tier I RPS resources
 - North Carolina includes swine waste in RPS
 - Connecticut includes fuel cells in Class I RPS requirements

3. Focus on legitimate state goals

- States must still show legitimate goals even with neutral statute.
 - Reliability
 - Environmental health
 - Energy conservation
 - Emissions reductions
- Incorporate these goals prominently in programs.

4. Recast location-based requirements in a facially neutral manner

Example: You may achieve the same result with a functional eligibility requirement for DG as you would with an in-state location requirement.

5. Regional location requirements

- Regional location requirements are facially discriminatory...but they are less restrictive than in-state
- No cases directly overturn a statute for regional discrimination
- Some constitutional uncertainty remains, but overall, regional location requirements may reduce risk of a challenge.

6. Build a record showing no alternatives

- Hard to justify facially discriminatory statute based on lack of alternatives, but can try
- Build legislative or administrative record with testimony and studies showing:
 - Compelling state interest and
 - Lack of alternatives to accomplish state goals

7. Limit, rather than prohibit use of out-of-state unbundled RECs

- Disparate treatment of in-state v. out-of-state unbundled RECs is difficult to justify.
- Options:
 - Put uniform limit on use of ALL unbundled RECs for RPS compliance
 - Will market participant rule help? Very narrow and untested.
 - Limit number of out of state RECs that can be used rather than fully prohibit. Still problematic but may reduce chances of a challenge

8. Phase in requirements gradually

- Minimize impacts of RPS programs favoring in-state development on existing contracts and out of state entities
- Will not eliminate constitutional problems, but reduces risk of challenge.

9. Assess Risks

- Many statutes have gone unchallenged for years because out-of-state renewables companies are resource constrained
- Other companies - as well as utilities - do have resources to challenge
- Even if chances of litigation are minimal, states may want to re-evaluate and make changes to programs.

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