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Protecting Local Renewables Laws from Constitutional Law Attacks

Recently, several statewide renewable standards that require or give preference to in-state generation have come under attack for violating the constitutional prohibition against discrimination against interstate commerce. This brief provides guidance on how to craft renewable energy standards and procurement mandates that promote local generation, while protecting such laws from constitutional attacks.

Background

Some statewide renewable standards are already under attack for violating the dormant Commerce Clause's prohibition on discrimination against interstate commerce. These attacks are part of a broader strategy by the American Legislative Exchange Council (ALEC) and fossil fuel corporations to repeal popular renewable energy mandates across the country.[i] As of June 2013, these challenges include an energy company's settled claim attacking the Massachusetts renewable portfolio standard (RPS) and an organization's ongoing litigation against the Colorado renewable energy standard.[ii] Other state renewable mandates are currently vulnerable to such threats.[iii] A June 2013 decision by the Seventh Circuit Court further fueled the fire by casting doubt on the constitutionality of Michigan's RPS requirement for only in-state generation. Judge Posner rejected an argument by the state of Michigan, noting that "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."[iv]

Solutions

Policymakers can protect state renewable laws by avoiding "facially discriminatory" and "discriminatory purpose" language.[v] Facially discriminatory language explicitly discriminates against out-of-state companies or resources – for example, making only in-state generation eligible towards meeting set goals. Similarly, discriminatory purpose language in a bill is explicitly discriminatory – for example, the purpose of this bill is to create in-state jobs.[vi]

There are many excellent and non-discriminatory purposes for states to mandate that utilities procure distributed generation, which has great amounts of additional value to utility ratepayers and citizens when compared with central generation. This additional value includes enhanced energy system resilience, avoided transmission costs, avoided line losses and congestion, faster compliance with renewable energy targets, and conservation of pristine lands.[vii]

The Clean Coalition recommends the following approaches for promoting distributed generation while reducing vulnerability to constitutional law attacks.[viii]

1. **Compensation for Additional Value of Distributed Generation**: Since distributed generation (defined as electric generation connected to a utility's distribution grid) has greater value to utilities and citizens than central generation (defined as generation connected to the transmission grid), a state may mandate that distributed generators should receive greater compensation for the additional value that they provide to utility ratepayers and/or to state

citizens.

2. **Carve-out for Distributed Generation**: Since distributed generation has additional value to utilities and citizens and can provide grid services that enhance energy system resilience, it is substantially different and preferable to central generation. In other words, a local kilowatt is not the same as a remote kilowatt. Therefore, a state may create a carve-out within a renewable standard for distributed generation.

3. **Mandate for Distributed Generation**: Since distributed generation has additional value to utilities and citizens, it is substantially different and preferable to central generation. Therefore, a state may mandate that utilities purchase specified amounts of distributed generation.

References

[i] Maria Gallucci, *Renewable Energy Standards Target of Multi-Pronged Attack*, InsideClimate News (March 19, 2013).
[ii] Daniel Lee and Timothy Duane, *Putting the Dormant Commerce Clause Back to Sleep: Adapting the Doctrine to Support State Renewable Portfolio Standards,"* 43 Environmental Law 295-364, published by Lewis and Clark Environmental Law Review (April 18, 2013)
[iii] Steven Ferrey, *Threading the Constitutional Needle With Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 U. Tex. J. Oil, Gas & Energy Law 59, published by University of Texas Law Review (January 2012)
[iv] *Illinois Commerce Commission v. Federal Energy Regulatory Commission,* 2013 WL 2451766 (unpublished), United States Court of Appeals, Seventh Circuit. Parallel Citation: Util. L. Rep. P 14, 856 (June 7, 2013)
[v] Lee and Duane, see above
[vi] Lee and Duane, see above
[vii] See the Clean Coalition's CLEAN Resource Hub Legislative Materials and the Local CLEAN Program Guide Avoided Costs Module for details.
[viii] The Clean Coalition thanks Professor Timothy Duane for reviewing and approving these approaches.