

MEGA Response To Renewable Energy Question #14

A possible issue is whether state limits on geographic location of RE or preferences for local sources/employment constitute unconstitutional state regulation of interstate commerce. Under the dormant commerce clause legal principle, economic favoritism in state laws that discriminate against interstate commerce on their face will be struck down as *per se* invalid. Electric energy and RECs move in interstate commerce and applicability of the dormant commerce clause and federal preemption to state renewable energy laws is analyzed in a recent law review article – Ann Havemann, *Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws With The Federal Constitution*, 71 Maryland Law Review 848 (2012) or <http://digitalcommons.law.umaryland.edu/mlr/vol71/iss3/6/>. This article discusses the recent TransCanada litigation in MA, the American Tradition Institute case challenging the CO RPS and potential challenges to the PJM footprint limitation in the MD RPS and the solar state grid footprint limit in MD.

Other comments on the constitutional law issues arising from renewable energy laws include:

- Molinelli, *Renewable Energy Development: Surviving the Dormant Commerce Clause*, ABA Section of Environment, Energy and Resources (September 2012, vol 4, #1).
- Elefant & Holt, *The Commerce Clause and Implications for State Renewable Portfolio Standard Programs* (Clean Energy States Alliance – March 2011).
- Rossi, *Dormant Commerce Clause Challenges to State RPS Programs*, www.mcombs.utexas.edu.
- Ramsey, *Power Plant Siting in a Deregulated Electric Energy Industry: Discerning the Constitutionality of Siting Statutes Under the Dormant Commerce Clause*, *Journal of Land Use*, vol. 21.1, p 94 (2005).

There are numerous other articles on this subject. Federal preemption analysis was conducted by the FERC in Dockets Nos. EL10-64-000 and EL10-66-000 regarding a questions whether the California feed-in tariff rate for CHP generation was preempted by PURPA and the Federal Power Act providing for federal regulation of wholesale power rates.

See also the decision in Rocky Mountain Farmer's Union v Goldstene (1:09-cv-02234 ED Cal, 12-29-11) striking down provisions of the California low carbon fuel standard regarding treatment of in-state vs. out-of-state ethanol under the dormant commerce clause. This case is on appeal to the 9th Circuit.

