State Renewable Energy and EO Policy in Need of Change?

Michigan Electric Cooperative Association
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RPS with In-State Mandate

- 30 states now have a RPS
- Several states, including Michigan, included a requirement that renewable generation asset must be located in Michigan.
- Strategy is to keep the economic benefits of RPS programs within state borders.

RPS with In-State Mandate

- The Commerce Clause of the U.S. Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . ."
- It has long been recognized that while the clause is explicitly a positive grant of authority to Congress to regulate interstate commerce, it also has an implicit "negative" or "dormant" aspect in limiting the authority of States to regulate in the same way.

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RPS with In-State Mandate

- Problem is that when a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has generally struck down the statute
- When the state statute amounts to simple economic protectionism, a 'virtually per se rule of invalidity' has applied.

RPS with In-State Mandate

- Under the Supreme Court's current dormant Commerce Clause doctrine, a requirement that the renewable energy used to meet a state's RPS obligation be generated within the state itself, which is the most direct means for a state to retain the economic benefits of its RPS program for itself, would almost certainly be struck down.
- ***NOTE: STATE RENEWABLE PORTFOLIO STANDARDS: THEIR CONTINUED VALIDITY AND RELEVANCE IN LIGHT OF THE DORMANT COMMERCE CLAUSE, THE SUPREMACY CLAUSE, AND POSSIBLE FEDERAL LEGISLATION***
- **Winter, 2008 45 Harv. J. on Legis. 259**

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RPS with In-State Mandate

- TransCanada Power Marketing Ltd. vs. Bowles (Commonwealth of Massachusetts)
- Filed April 2010 in U.S. District Court for the Central District of Massachusetts arguing that Massachusetts is unconstitutionally discriminating against out-of-state renewable energy producers.
- Challenging the in-state requirement of Mass' RPS under the Commerce Clause.
- If successful will affect other states that have in-state requirements--Michigan.

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E O Needs Revision

- EO legislation passed October 2008.
- A “one size fits all” approach with little to no accommodation give to smaller utilities.
- Silo affect
- Annual targets do not allow for significant roll forward when numbers are exceeded.
- MPSC has limited (to no) discretion
  - MMEA group denied request to provide alternative billing information; MPSC states it has no discretion to waive requirement imposed by the legislature.

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E O Needs Revision

- Solutions require amendment to P.A. 295
  - More discretion for MPSC to implement alternative approach for smaller utilities.
  - Allow for unlimited carry forward if utility waives incentive payments.
  - Allow all EO surcharges to be spent on any programs, as long as programs are offered for all customer classes.

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Feed In Tariffs: A Bad Policy Trying to find a Home

- FITs require utilities to purchase power from renewable resources at prices set to "guarantee" a profit to the generator. Typically higher than market rates.
- Have been several bills introduced that would impose FITs.
- MPSC Staff have been investigating how FITs could be implemented.

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Feed In Tariffs

- Only problem is that absent change in Federal legislation, state FITs will not work.
- In July, the FERC affirmed its exclusive authority to regulate the rates, terms and conditions of sales for wholesale electricity.
- FITs are rates for wholesale electricity.
- Therefore, FITs must comply with either the Federal Power Act of 1935 or PURPA.

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Feed In Tariffs

- State level FITs are wholesale prices and cannot be regulated at the state level under the Federal Power Act. The states' role is limited to determining "avoided cost" rates for "qualified facilities" under PURPA.
- Waxman-Markey included language that would have paved the way for state enacted FITs.