

WILL CALIFORNIA'S 33% RENEWABLE PORTFOLIO STANDARD SURVIVE A COMMERCE CLAUSE CHALLENGE BY OTHER STATES? A RECENTLY FILED COLORADO CASE MAY PROVIDE THE ANSWER

By Michael N. Mills

Attorney with the Law Firm of Stoel Rives LLP, Sacramento, CA (www.stoel.com)

Last fall, the attorneys general of at least four states said they were preparing to sue the State of California if AB 32 (otherwise known as Proposition 23) survived the ballot box referendum on many of its substantive provisions. The lead prosecutors for the states of Alabama, Texas, Nebraska and North Dakota indicated their plans to sue California's greenhouse gas law on the grounds that it "interferes with the right to freely conduct interstate commerce" in violation of the U.S. Constitution. The target of such a lawsuit would be AB 32's mandating a 33% renewable energy portfolio standard ("RPS") for California electric utilities. California obtains 30% of its power from beyond its borders, most of it from states in the Pacific Northwest and the Southwest.

Last year, Governor Schwarzenegger issued an Executive Order directing California's Air Resources Board to develop regulations for a 33% RPS under the authority of AB 32. Following this fall's election, Democrats in the state legislature introduced Senate Bill ("SB") X1-2, which was passed at the end of March 2011 and signed by Governor Brown on April 12, 2011. The law requires California's electric utilities to procure 33% of their energy from renewable sources by the year 2020. In his signing statement, Governor Brown stated the "bill will bring many important benefits to California, including stimulating investment in green technologies in the state, creating tens of thousands of new jobs, improving air quality, promoting energy independence and reducing greenhouse gas emissions." With the enactment of SBX1-2, California will have the most aggressive renewable energy policy in the country. It also undoubtedly will get its share of lawsuits from other states challenging the law as unconstitutional. Such a fate already has befallen Colorado's renewable energy standard ("RES") in the case of American Tradition Institute, et al. v. Colorado.

Just eight days before Governor Brown signed SBX1-2, various conservative groups filed suit in federal court in Colorado challenging Colorado's RES. Colorado's RES states that by 2020 the state's two major investor-owned utilities must get 30% of electricity sold from recycled or renewable resources. Renewable energy resources are "solar, wind, geothermal, biomass, new hydroelectricity with a nameplate rating of ten megawatts or less, and hydroelectricity in existence on January 1, 2005, with a nameplate rating of thirty megawatts or less." "Fossil and nuclear fuels and their derivatives" are not "eligible energy resources" for complying with the RES.

Of particular importance to California, plaintiffs in American Tradition Institute, et al. v. Colorado raise a sweeping Commerce Clause claim: Colorado's statutory scheme is unconstitutional because it discriminates against non-renewable generation resources, both in-state and out-of-state, with plaintiffs alleging that such non-renewable generation is "legal, safer, less costly, less polluting and more reliable than renewable generation." Plaintiffs' Commerce Clause claim is grounded in a U.S. Court of Appeals for the Tenth Circuit's decision in *KT&G Corp. v. Attorney General of the State of Oklahoma*, which says a state may violate the dormant Commerce Clause by:

- Discriminating against interstate commerce in favor of intrastate commerce, unless "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism"; or
- Imposing "a burden on interstate commerce incommensurate with the local benefits secured"; or
- Creating mandates with the "practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question."

Undoubtedly, Colorado will vigorously defend its RES as being constitutional because it will assert that promoting renewable energy generation is an important policy choice. Plaintiffs are attacking that position head-on, however, by challenging the policy of favoring renewable resources, particularly wind energy. They allege that wind energy is not reliable, causes more pollution due to the cycling of coal and natural gas plants during times when wind generation is not possible and drives up utility costs for consumers. They do not attack other forms of renewable energy as vociferously, but still argue that any scheme favoring renewable resources over other energy sources burdens interstate commerce and violates the Commerce Clause.



The outcome of this case could have a profound impact on California's 33% RPS and any legal challenges mounted against it. A key question that the courts have yet to answer is whether such mandates create protectionist barriers to interstate trade.

Until these cases are decided, however, in California you can expect the pressure to develop new renewable energy projects to continue to grow, as utilities work toward meeting the RPS requirements. The past few years have seen a significant rise in proposed wind and solar projects throughout the state, and regulatory agencies are struggling to keep up with the review and approval process to allow these projects to move forward. One of the biggest impediments to new projects is the permitting process, which varies depending on the technology proposed and the size of the project. Some projects qualify for the streamlined, one-stop shop permitting process at the California Energy Commission, but many renewable projects will be permitted by the local jurisdiction where the project is located. These local jurisdictions are already faced with diminishing resources and cuts in staffing that impede project processing timelines. The increased RPS may simply exacerbate this problem.

These competing demands on renewable project permitting will create numerous disadvantages for permitting oil and gas projects because the regulatory "red tape" is being cut left and right for renewable energy projects, while state and local regulators, especially in Sacramento, continue to show no inclination to do the same for the oil and gas industries. The California Energy Commission and the Bureau of Land Management, in coordination with other state and federal agencies, have been pursuing policies and programs to facilitate streamlined review and approval of renewable projects. Those policies and programs will take time to establish, but once in place should provide expedited renewable energy project approvals. In Kern County, one of the most desirable California counties for both wind and solar projects, as of April 1, 2011, there were over 30 pending applications for solar projects and approximately 10 pending applications for wind projects. Kern County staff has indicated that, generally speaking, the timeline for processing permits for new solar project applications is at least 18 months, maybe longer. But Kern County and other counties in California are exploring opportunities to streamline environmental review and looking at options such as the use of programmatic environmental impact reports ("EIR") to help facilitate faster permitting of projects. Kern County has gone so far as to approve a resolution to support any state legislation that would exempt renewable energy projects within a programmatic EIR from challenges under the California Environmental Quality Act.

¹The Global Warming Solutions Act of 2006, Division 25.5 of Health & Safety Code, § 38500 et seq.

²Source Watch, Global Warming Solutions Act of 2006 (last modified Sept. 10, 2010).

http://www.sourcewatch.org/index.php?title=Global_Warming_Solutions_Act.

³Id.

⁴Case No. 11-cv-00859-WJM-KLM (D. Colo. April 4, 2011).

⁵535 F.3d 1114, 1143 (10th Cir. 2008).