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Energy in the Law

Federal Judge Upholds Colorado's RPS Standards; Further Challenges Loom

By: Ken Warner

On May 9, 2014, Federal Judge William J. Martinez, of the U.S. District Court District of Colorado, denied a challenge to Colorado's renewable portfolio standards (RPS).[1]

The suit, brought by the Energy and Environment Legal Institute (f/k/a American Tradition Institute), challenged the constitutionality of Colorado's Renewable Energy Standard Statute.[2] Under the theory that the state's RPS violates the dormant commerce clause, the plaintiffs argued that the Colorado statute improperly regulates wholly extra-territorial commerce. Starting from the basis that the power disseminated by a utility is generated from a variety of sources, including out of state providers, the plaintiffs reasoned that a utility generating electricity from a coal-fired plant located outside Colorado would not meet Colorado's RPS and, subsequently, the energy generated would not be credited towards Colorado's renewables quotas. Therefore, according to the plaintiffs, the statute should be invalid *per se* because it has the practical effect of regulating commerce entirely outside Colorado's borders.

The court denied the plaintiffs' challenge, finding that the state's RPS does not impact transactions between out-of-state businesses. For instance, Colorado's RPS does not preclude a Wyoming coal-fired generator operator from selling its energy to a South Dakota company. The RPS only regulates Colorado energy generators and the companies that do business with Colorado energy generators; only those companies that voluntarily enter into a transaction with a Colorado utility must avail themselves to the RPS. Moreover, Colorado

[1] http://earthjustice.org/sites/default/files/files/Colorado.Renewable.Order_.pdf
[2] http://www.dora.state.co.us/puc./rulemaking/Amendment37/Section40-2-124.doc

utilities may still purchase out-of-state energy produced from fossil fuels; however, the power would not count towards the utilities' renewable quota. The court concluded that extraterritorial companies are free to generate electricity using whatever method they chose and they can sell that electricity to whomever they choose—inside or outside of Colorado—at whatever price they choose. Ultimately, the plaintiffs failed to show that the market shift away from coal and hydrocarbon electricity generation substantially burdens interstate commerce.

Generators of renewable energy should be aware that there are often state-by-state discrepancies with regard to what constitutes "renewable" energy. Because the definition of "renewable" energy generally falls under a state's public utility commission statutes, inconsistencies arise. However, in the current decision, the court concluded that those inconsistencies will not rise to the level of a constitutional problem unless they impede the interstate flow of electricity.

This Colorado District Court decision contrasts with that decision recently handed down by the U.S. District Court of Minnesota. There, the court held that the state's RPS scheme was extraterritorial regulation. Looking forward, upon appeal to the 10th Circuit, the court will decide whether it agrees with the Colorado court's decision or whether it agrees with the Minnesota court's decision. The 30 states with similar RPS schemes will be watching the outcome of this impending appeal with renewed interest in light of the split decision amongst jurisdictions.

For further information please contact Ken Warner.