Legal Barriers to Sub-National Governance Techniques by U.S. States for Renewable Energy Promotion and GHG Control

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Abstract

The attempt by many U.S. states to copy verbatim the European model of feed-in tariffs to promote renewable power and recent efforts of states to promote their renewable power development or greenhouse gas ("GHG") emission restrictions have been successfully challenged legally in the past few months. These challenges have reinforced that these E.U. and Kyoto mechanisms employed by the states in the U.S. as a governance tool, run afoul of the U.S. Constitution. Renewable and climate change policy in the U.S. is undertaken by regulatory actions at the state, rather than federal, level. This is a significant issue going forward regarding institutional mechanisms available to U.S. states.

On the flip-side of the coin, in separate legal actions, states were recently confronted with litigation, and settled, legal challenges raising Constitutional issues regarding their renewable RPS programs and RGGI carbon emission restrictions. The states are "batting" 0-3 in these various legal challenges to date. These are not just any states that were challenged, but the three most proactive renewable energy and GHG emission-controlled states in the country: New York, Massachusetts, and California. The European system of governance and regulatory techniques are subject to strict limitations when applied as a governance mechanism by U.S. states.

1 Renewable Energy and GHG Regulatory Techniques

With ten U.S. states now considering feed-in tariffs, Constitutional impediments will complicate the exercise of this state regulatory authority. The Supremacy Clause of the U.S. Constitution creates a legal barrier to certain state-mandated regulatory actions. In a federalist legal system, there are limits on what the states may do without being preempted pursuant to the U.S. Constitution.

European policies that mandate that utilities and their ratepayers pay more for renewable power through feed-in tariffs can run afoul of four Supreme Court precedent interpreting energy and

environmental state regulation permissible under the U.S. Constitution. These Constitutional limitations cannot be overcome simply by passing a state statute in a given state. The Constitution remains the ultimate law of the land.

There still can be powerful renewable energy incentives that pass legal muster. Aside from global warming emission reduction requirements, other incentives include tax incentives, renewable trust funds, and carefully sculpted Renewable Portfolio Standard ("RPS") requirements with tradable renewable energy certificates ("RECs"). Because the legal systems of European nations and the U.S. are distinct, what is permissible in one does not always seamlessly translate legally to the other.

2 Feed-In Tariffs

Feed-in tariffs are the most widely employed renewable energy policy in Europe and, increasingly, the rest of the world. Forty five countries as well as 18 states/provinces/territories have implemented feed-in tariffs.[ii] This includes some form of feed-in tariff in approximately 28 developing countries. Feed-in tariff designs and impact vary, especially in developing countries. Feed-in tariffs go by many names and definitions. The U.S. National Renewable Energy Laboratory (NREL) recently defined feed-in tariffs as:

> "A feed-in tariff (FIT) is an energy supply policy that offers a guarantee of payments to RE developers for the electricity they produce. Payments can be comprised of electricity alone or of electricity bundled with renewable energy certificates (REC)… These payments are generally awarded as long-term contracts set over a period of 15-20 years. FIT policies can be understood as an advanced form of production-based incentive (PBI), where a payment is awarded for the actual electricity produced ($/kWh)."

A California Energy Commission report leaves the definition of a feed-in tariff relatively vague and then later identifies that what is bought and sold can include electricity only, or can also include RECs and/or other bundled environmental attributes when adapted to the US context:

> "A simple definition of a feed-in tariff is an offering of a guaranteed payment over a specified term with specified operating conditions to eligible renewable energy generators (although some feed-in tariffs step down in price over time) and can be either an all-inclusive rate or a premium payment on top of the prevailing spot market price for power. The price paid represents estimates of either the cost or value of renewable generation. The tariff is generally offered by the interconnecting utility and sets a standing price for each category of eligible renewable generator; the price is available to all eligible generators. Tariffs are often differentiated based on technology type, resource quality, or project size, and may decline on a set schedule over time." [iii]

Feed-in tariff structures are typically either fixed payments based on an electricity generator's cost to produce electricity, or as a fixed premium paid above the spot market or wholesale market price of electricity. These fixed payments are long-term contracts for anywhere from five to thirty years in

duration.[iv] And here lies the legal problem that is examined more below: Despite reports giving little treatment to the legal requirements, mandating a payment based on what is demanded by the producer, rather than what renewable power is objectively worth to the buyer in the market, sets a state-mandated wholesale price that is contrary to federal law, guarding against "unjustified" or "unreasonable" prices paid for wholesale power.

Feed-in tariffs, whether implemented by themselves or though REC market prices (discussed below), increase the power sale price for certain wholesale renewable technologies to an amount that is deemed administratively and politically necessary to encourage their development, rather than what the value of the power is actually worth in the market to the purchaser. Feed-in tariffs exceed market wholesale prices and utility-avoided costs, and therefore are justified only by their objectives and results, and not typically by accepted ratemaking methodology, which aims to minimize generating costs to prudent and reasonable market levels.

Feed-in tariffs have been successful in encouraging significant renewable energy development with 45% of global wind power deployment and 75% of solar PV deployment attributable to feed-in tariff policies through 2008.[v] Often, feed-in rates are differentiated by technology and are based on the cost to the producer of deploying a given renewable energy technology.[vi]

Costs of a feed-in tariff are passed on to retail consumers by purchasing energy suppliers and reflect a public policy decision to increase the percentage of renewable electricity sources in use.

Internationally

Italy, Sweden, and the United Kingdom initially favored RPSs, while Germany, Spain, and other countries favored feed-in tariffs. Germany, Denmark, and Spain, while only a small fraction of the size of the United States in square miles, were responsible for 53% of total installed global wind power capacity between 1990 and 2005.[vii] Germany receives 5% of its total energy from wind power, Demark nearly 20%, and Germany surpassed its 12.5% goal of renewable electricity by 2009, three years earlier than expected.[viii]

Germany's feed-in tariff program created the world's largest solar energy market. In Germany, the current debate is whether the expense of feed-in tariffs is too high given what their consumers are willing to support.[ix] The average German electric bill has increased by roughly $3 per month (€1.45/month)[x] over the period of feed-in tariff implementation.[xi] The German public has generally

supported the increase, especially since many individuals have taken advantage of the incentives to install their own renewable energy generation systems.[xii]

The European Commission concluded that feed-in tariffs are more effective than quota-based tradable REC systems.[xiii] For example, Germany's wind power was on average more than 20 % cheaper than wind power installed under a tradable REC system in the UK.[xiv] Similar findings have since been reported by the Stern Review on the Economics of Climate Change (2006),[xv] the International Energy Agency,[xvi] in analyses conducted on behalf of the New Jersey Board of Public Utilities in the United States,[xvii] and by Ernst & Young.[xviii]

In the United States

Feed-in tariffs have not historically been sanctioned in the U.S. The most prevalent renewable energy policy enacted by states is the Renewable Portfolio Standard ("RPS") with a REC component. The two are similar to the extent that they only qualify renewable power that is actually produced. The feed-in tariff does this by linking the renewable subsidy to the price paid for renewable power, while the RPS does this by creating a separate tradable renewable attribute, or REC.

However, the momentum and impact of European feed-in tariff policies has caused some U.S. states to propose legislation and adopt policies similar to European feed-in tariffs (FiTs). As many as ten states have introduced actual feed-in tariff legislation, while a handful of others are considering feed-in tariff policies. That groups includes Arkansas, California, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia and Washington State. Vermont was the first US state to implement a FIT in 2009,[xix] for long-term contracts for 15-25 years at tariffs differentiated by technology and size (ranging from $0.12 – 0.30/kWh), with an individual project cap of 2.2 MW.

The Supremacy Clause, Federal Preemption and Wholesale Rates

Sections 205 and 206 of the FPA empower FERC to regulate rates for the interstate and wholesale sale and transmission of electricity.[xx] In doing so, the act bestows upon FERC broad power to shape the energy market affecting all stakeholders. By exercising exclusive authority over "just and reasonable" rates and terms, FERC is charged with responsibility to ensure that wholesale generators of electric power will charge fair rates to retailers, and that wholesale generators receive a fair rate of return, and thus "have the incentive to continue to produce and supply power.[xxi]

The Act creates a "bright line" between state and federal jurisdiction, with wholesale power sales falling on the federal side of that line[xxii]: "Congress meant to draw a bright line easily ascertained

between state and federal jurisdiction, making unnecessary case-by-case analysis….making [FERC] jurisdiction and extending it to all wholesale sales in interstae commerce…".[xxiii] This preempts state regulation of wholesale power transactions and prices: State regulation is not allowed to veto the regulatory scheme of a superior level of government. FERC jurisdiction is plenary and extends to all wholesale power sales in interstate commerce.[xxiv]

There is no dispute that sales of wholesale renewable power to investor-owned regulated utilities are (1) wholesale power transactions and (2) interstate power transactions, unless they occur in Alaska, Hawaii, or parts of Texas. All are subject to exclusive federal jurisdiction; state authority is preempted. As the federal Court of Appeals recently remarked, and the Supreme Court confirmed, reforms in about a third of the states have taken their regulated utilities out of the power generation business and caused them to purchase wholesale the power that they distribute later at retail, and contributed to "a massive shift in regulatory jurisdiction from the states to the FERC." [xxv]

These Constitutional limitations on state authority affect only regulation of investor-owned utilities, which collectively serve approximately three-quarters of American consumers; they do not affect government-owned utilities which are not subject to the Federal Power Act. In some states, government officials are moving to compel private investor-owned utilities they regulate and their ratepayers to bear higher-than-wholesale-market rates for renewable power.

The Filed-Rate Doctrine

The so-called "filed-rate doctrine" of federal/Constitutional law, holds that state regulatory commissions may not second-guess or overrule on any grounds a wholesale rate determination made pursuant to federal jurisdiction. The Supreme Court in 1986 and again in 1988, 2003, and 2008, upheld the filed-rate doctrine.[xxvi]

Feed-in tariff rates are set by the state above the already-set mandatory federal wholesale price of energy and above avoided cost rate levels. This results in at least a temporary increased wholesale and retail cost of electricity. And here lies the conundrum: Does this conflict with either the requirements of the Public Utility Regulatory Policies Act (PURPA), which is part of the FPA, or the general rate-setting requirements of FERC under the FPA?[xxvii] A series of court decisions over the past two decades makes this the key question under the Supremacy Clause of the United States Constitution.

The PURPA promotion of renewable energy is premised on renewable energy generators receiving only the utility's avoided cost rate.[xxviii] PURPA, therefore, specifically provides that no state

mandate requiring a utility to purchase energy from a QF "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy."[xxix] Congressional hearings emphasized the use of avoided cost methodologies to determine the cost of acquiring alternative electric power, so that no particular electricity producer or consumer would subsidize the inefficiency of another.[xxx]

Therefore, if a state orders or approves a wholesale power sale rate above the federally-approved wholesale power rate pursuant to the FPA, or above the PURPA avoided cost, it not only crosses the no-state-jurisdiction line, but specifically contradicts the federal wholesale rate determination and raises power costs. Again, there are some exceptions to which this filed rate doctrine does not apply: Unregulated government utilities, federal marketing agencies, municipal utilities, and utilities in Alaska, Hawaii, and parts of Texas which are not connected in the interstate power grid. There also are two other exemptions affecting regulated investor-owned utilities.

Limited Exceptions

There are two limited exceptions. The first exception is if the excess cost is for a green energy program in which utility retail customers individually voluntarily agree to higher rates for renewable power covering the costs above the utility's avoided cost.[xxxi] Of that one-quarter of the nation's utilities that offer such renewable energy purchase options, it is typical that only about 1-2% of their customers elect this more expensive option.

The second exception applies to net metering. On March 28, 2001, FERC held that state net metering decisions were not preempted by federal law, because no "sale" of power occurs when an individual consumer installs distributed generation and accounts for its dealings with the utility through the practice of netting.[xxxii] Eighty percent of the states have electively adopted "net metering," which runs the retail utility meter backwards when a renewable energy generator of an eligible size and type puts power back to the grid. As of 2010, forty-two states and the District of Columbia had some form of net metering. Net metering can pay the eligible renewable energy source up to approximately four times more for this power when it rolls the retail meter backwards compared to what the market values as the price for wholesale power.

State Renewable Wholesale Fit Power Pricing Constitionally Stricken in 2010 California Matter

In 2008, the California Public Utilities Commission ("CPUC") announced the availability of feed-in tariffs to support the development of up to 480 megawatts (MW) of renewable generating capacity

from small facilities throughout California. These feed-in tariffs allowed small renewable generators up to 1.5 MW to sell power to certain listed utilities at terms of 10, 15 or 20-year fixed-price, non-negotiable contracts. This program is designed to benefit entities with significant onsite renewable generating potential and combined heat & power, in excess of what they can use onsite. In October 2009, California enacted new legislation to increase the size of facilities eligible for California feed-in tariffs from 1.5 Mw to 3 Mw.[xxxiii]

In 2010, FERC was asked by California to assess these program elements and issued a definitive ruling on state feed-in tariffs. It held that the Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce.[xxxiv] While Congress has authorized a role for states under delegated federal authority in setting wholesale rates under PURPA, Congress has not authorized other opportunities for states to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give states this authority. FERC totally dismissed California's argument that there was a difference if a state only ordered its regulated utilities to establish an "offer price," which constitutes impermissible wholesale rate-setting by the state. Such decisions are setting rates for wholesale sales in interstate commerce by public utilities, and are preempted by the FPA and the U.S. Constitution.

FERC in this 2010 opinion addressed legal issues concerning whether state statutes are consistent with the FPA, and whether they meet the requirements of PURPA, in cases concerning *Midwest Power Systems* and *Connecticut*. In *Midwest Power Systems*, the Commission found that an Iowa statute and the implementing orders of the Iowa Utilities Board were consistent with federal law to the extent that they required utilities in Iowa to purchase from certain types of generating facilities, but also found that the orders of the Iowa Utilities Board were preempted to the extent they required sales by renewable QFs be made at rates in excess of the purchasing utilities' avoided cost, and to the extent they set rates for wholesale sales of electric energy by non-QF public utilities.[xxxv] In *Connecticut*, the Commission similarly found that, to the extent a Connecticut statute required sales by a QF be made at rates that exceeded avoided cost, the statute was preempted by PURPA.[xxxvi] The Commission reasoned there that wholesale QF rates cannot both be capped by full avoided cost (pursuant to the federal statute) and exceed the avoided cost cap (pursuant to the state statute). In its order denying reconsideration of *Connecticut*, the Commission found that, "even if a QF has been exempted pursuant to the Commission's regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with the requirements of PURPA and this Commission's regulations—i.e., a state cannot impose rates in excess of avoided cost."[xxxvii] The rate established by a state can not exceed the avoided cost of the purchasing utility.[xxxviii]

In a sense, there is nothing new in this 2010 California decision. State regulatory action has been stricken by federal courts and FERC regarding similar California actions 15 years ago when it either raised or lowered the federally-jurisdictional rate paid for power to wholesale renewable energy projects. First, lowering wholesale renewable prices is not permissible. In *Independent Energy Producers Association*, the California state utility commission authorized utilities to suspend payment to renewable power-selling Qualifying Facilities (QFs) if the utility found that the QF did not comply with federal standards, and substitute a 20% lower, alternative rate.[xxxix] The court stated that the rate paid by utilities for electricity must be determined by calculating the avoided cost that the utility would pay if it had to purchase electricity outside the renewable QF contract price. The court also commented that federal PURPA full avoided cost rates are the "statutory ceiling."

Going the other direction, raising renewable energy prices as an incentive to the power producer, also have been stricken. In *Southern California Edison Company, San Diego Gas & Electric,*[xl] FERC refused to sanction a higher California price for renewable power supply. The California PUC had ordered two of its investor-owned and regulated utilities to sign long-term fixed-price contracts with renewable QF power sellers to purchase electricity at prices that were competitive with what it cost for the developer to do a renewable energy project, but nonetheless in excess of the utilities' avoided cost and/or the price of wholesale power in the market. Edison, one of the affected utilities, had wholesale electricity supply options available for $0.04 per kWh or less, while the PUC required purchase of renewable prices as high as $0.066 per kWh. Of note, the currently adopted or proposed feed-in tariffs in 2010 contain a price premium for renewable power substantially greater than this 50% premium, in some cases being 600% of current avoided costs and/or wholesale power prices. Under the filed-rate doctrine, any dispute about these matters may not be arbitrated by the state, but is reserved exclusively to federal authority.[xli]

Avoided cost is defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source."[xlii] The avoided cost rate must reflect prices available from all wholesale power sources able to sell to the utility, regardless of generation technology.[xliii] This concern does not ameliorate over time: The FERC further stated that, "[a]s the electric utility industry becomes increasingly competitive, the need to ensure that the states are using procedures which ensure that QF rates do not exceed avoided cost becomes more critical."[xliv]

The federal Court of Appeals agreed in deciding a third California case.[xlv] While this decision proceeded on appeal to the U.S. Supreme Court[xlvi] and thereafter was remanded to FERC for more clarification,[xlvii] its holding was not overturned at the Supreme Court. The court ruled that Congress did not intend that the scope of FERC's jurisdiction over the interstate sale of electricity at wholesale be determined by a case-by-case analysis of the impact of state regulation on national interests.[xlviii]

California is not alone in trying to justify rates above avoided cost. National Grid, the major power distribution company for Rhode Island, agreed to pay 24.4 cents Kwh beginning in 2013 for power from the Deepwater Wind Project of 20.8 Mw on Block Island. This is several hundred percent above the expected value of wholesale power at that time. TransCanada, the owner of a Maine wind project who had successfully sued Massachusetts in 2010 regarding its renewable energy program, sought to intervene in the review approval of this deal which would award a long-term contract at above avoided cost and wholesale energy prices to in-state renewable energy. The Conservation Law Foundation, and environmental group, also sought dismissal of the power purchase agreement by the Public Utility Commission.

The FERC precedent goes further, stating that any future state action to order/approve a contract price for renewable power purchases above these prices is "void ab initio."[xlix] "Void ab initio" orders, contracts, and deals are automatically declared stricken from the moment of their enactment, even without initiating a separate case before FERC to contest it. This creates a significant Constitutional ring-fence around state discretion on wholesale transactions.

The FPA creates a "bright line" between state and federal jurisdiction, with wholesale power sales prices falling clearly and unequivocally on the federal side of the line. The wholesale price determination, which involves every feed-in tariff for wholesale sale of renewable power to investor-owned utilities, is reserved exclusively to federal authority.[l]

3 Renewable Portfolio Standards with Tradable RECS

There is an alternative to promote renewable energy production that half the U.S. states have implemented. It is state mandatory renewable energy supply requirements, which are usually imposed on electric utilities or independent retail suppliers. These alternatives typically are known as Renewable Portfolio Standards. Under an RPS program, the regulatory agency establishes the percentage quantity of electricity that must be supplied by eligible renewable projects, and the market determines the most cost-effective means and pricing to satisfy that independent variable of trading price of the credits created.

Under a feed-in tariff, the reverse occurs: the government establishes the price for a particular renewable energy project power output sale, and allows the market to decide how much quantity can be supplied at that price.

RPS programs exist in twenty-nine states plus the District of Columbia; six more states have nonbinding RPS goals.[li] These RPS programs cover half of nationwide retail electricity sales. It has been estimated that RPS motivated approximately 45% of the 4,300 MW of wind power installed in the U.S. between 2001 and the end of 2004.

Half of these existing RPS programs employ differentiated tiers of often tradable RECs. Some states distinguish tiers of RECs by the year in which the REC was created or the type of renewable resource used in creation of the REC, so as to promote certain technologies. Some states create technology set-asides or bands of technology. This creates myriad variations on state RPS models. Most states allow the open market to set the price at which RECs trade between renewable energy generators that sell them and power retailers that buy them. Recently, some state officials have talked about using state REC prices to work as a hybrid feed-in tariff.

State RPS programs regard differently the geographic location of RECs creation:

- At least three states expressly require that the RECs be created by in-state power generation, and two additional states require that RECs be created either in-state or in the service territory of a state utility
- Some states encourage, but do not require, RECs to be traded in-state by attaching a multiplier value to in-state RECs.

Eight states required that the power eligible for RPS RECs must be delivered to in-state load-serving entities.[lii] Geographic program restrictions attached to some state RPS programs providing a preference for in-state power RECs over RECs associated with out-of-state renewable power that is in interstate commerce, can raise separate Commerce Clause concerns under the Constitution.[liii] Such geographic discrimination occurs in states in various areas of the country.

Ohio[liv] requires that at least half of this renewable energy be generated within the state. Illinois' RPS program through 2011, requires that electric utilities must utilize resources that are located within the state,[lv] and provides the ability to seek outside resources under certain circumstances. Arizona[lvi] encourages in-state production of solar energy to the detriment of out-of-state producers by allowing utilities to earn extra credit multipliers for "early installation of certain technologies, in-state solar installation, and in-state manufactured content." New Jersey's trust fund, raised from sale of retail

electricity in the state, requires that "[s]uch programs shall include a program to provide financial incentives for the installation of Class I renewable energy projects in the State."[lvii] The renewable energy statute in Texas includes limiting language restricting benefits in state: "[i]t is the intent of the legislature that by January 1, 2015, an additional 5,000 megawatts of generating capacity from renewable energy technologies will have been installed in this state."[lviii] Massachusetts under its Green Communities Act required Massachusetts utilities to purchase renewable power from facilities within Massachusetts.[lix]

When There Is Geographic Discrimination

Article 1, section 8 of the Constitution states that "Congress may regulate Commerce…among the several States…." The dormant Commerce Clause prohibits actions that are facially discriminatory against interstate commerce.[lx] The so-called dormant Commerce Clause restriction is "driven by concern about 'economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[lxi] Discriminatory statutes are subject to "strict scrutiny," and for such a statute or regulation to be valid the state must establish that there is a compelling state interest for which the statute is the least intrusive means to achieve that interest. If the statute is found to discriminate against out-of-state interests based on geographic limitations or favoring local interests to the detriment of interstate commerce, the court will find the statute to be per se invalid.[lxii] In *West Lynn Creamery v. Healy*, 512 U.S. 186 (S. Ct. 1994) the Supreme Court found that "even if environmental preservation were the central purpose" of the regulation, it "would not be sufficient to uphold a discriminatory regulation."[lxiii]

These geographic program restrictions raise commerce clause concerns under the U.S. Constitution.[lxiv] Providing limitations for in-state use of electricity, fuel, or renewable portfolio standards has not been encouraged as constitutional by the courts. Use of indigenous fuel supplies for electricity was stricken in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Income tax credits cannot be given by a state only to in-state producers of fuel additives. *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 271, 278-80 (1988). In-state coal cannot be required by a state in order to satisfy federal Clean Air Act requirements. *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596-97(7th Cir. 1995).

Litigation

Massachusetts, starting in 2010, allowed only in-state solar PV RECs to be earned and traded. The Commonwealth of Massachusetts enacted a statewide renewable energy power auction to procure renewable power on behalf of willing in-state utilities that are required by state law to have at least three percent of their annual demand met through 10 year or 15 year wholesale power purchase agreements

with renewable power developers.[lxv] Massachusetts was sued by TransCanada Power with regard to the Massachusetts Green Communities Act which required Massachusetts utilities to purchase renewable power from facilities within Massachusetts.[lxvi] This suit by TransCanada Corp, the owner of a Maine wind project, was based on Constitutional grounds.[lxvii] The suit alleged that Massachusetts' limitation on both solar RECs and long-term contracts to Massachusetts companies, discriminated against out-of-state renewable energy projects in violation of the dormant Commerce Clause of the U.S. Constitution.[lxviii]

After stating that it had confidence in its position, Massachusetts immediately settled the litigation so as to avoid a court decision, providing that TransCanada would be eligible for these programs.[lxix] The scope of the settlement did not necessarily open up the program to all out-of-state programs, but gave a preference in the penalty price for compliance to certain pre-existing contracts and provided a relief-valve on penalties regarding requirements for in-state RECs eligibility. Therefore, Massachusetts surrendered to the battle, but avoided a court declaration on the Constitutional war.

In addition, the Massachusetts DPU extended time for utility distributor NStar to finalize ten-year 30-Mw power purchase agreements with two separate wind turbine developers in New York State and in Canada. Controversy was raised because the potentially higher price that NStar would pay for this renewable power from wind was not disclosed to other competitive entities. It also contradicted the habit of NStar since deregulation of retail power to purchase power in shorter increments than ten-year commitments.

In a related 2009 Constitutional suit, Indeck-Corinth, an existing cogeneration project with a long-term contract to sell power to ConEdison Company in New York, later joined by Brooklyn Navy Yard Co-Generation Project and Selkirk Cogen Partners, sued the state of New York regarding the legality and constitutionality of the requirement to purchase auctioned allowances under the New York version of the ten-state Regional Greenhouse Gas Initiative ("RGGI'). In a a reaction similar to that of Massachusetts, New York quickly agreed to settle the suit prior to trial, to avoid a declaration of illegality. New York told ConEdison to pay the cogeneration project for the cost of its additional carbon allowances through the end of their pre-existing long-term contracts. The settlement allows the utility company to ask the New York PSC to pass through the cost of these allowances, or approximately $3 million annually, to utility customers. This would not be itemized on the bills so that consumers would see this charge.

4 Conclusion

The states of California, New York, and Massachusetts not only have been leaders in these renewable energy and climate change control efforts, but also have very significant legal staffs to sculpt

programs in a careful way. When each of them is successfully sued and plaintiffs achieve their full remedy, it highlights the importance of the legal issues in play. It is fair to state that E.U. policies on renewable power and carbon allowances, are not seamlessly transposed to U.S. state initiatives. The U.S. system of federalism as part of the Constitution, does not give states unlimted prerogative in designing energy policies of their choices. There are strict lines over which states may not cross.

Particularly when states may act in discriminatory fashions, states are not allowed to act as if they have unfettered discretion to enact state-discriminatory energy policies. In addition, since the beginning of national energy legislation in the 1930s, states have not been allowed to regulate interstate wholesale electric power transactions. Consistently, for more than half of the history of electric power's use, and for all of the period of national regulation, there has been a clear line limiting state power. This has been reiterated by the U.S. Supreme Court and FERC consistently, with the most recent articulation of the Filed Rate Doctrine in 2008. There is nothing new or novel in this.

Some have profession indignation that the states can't do whatever they want with GHGs and renewable power to differentiate themselves from other states. However, the national power supply is not infinitely malleable by the states. There is nothing more quintessentially in interstate commerce than electric power. And states do not have free legal reign to harbor power or its renewable attributes, or to require power sale contracts be fashioned, in a discriminatory fashion.

The final conclusion from these examples is that forms of governance, as moderated by legal requirements, matter. Differences between nations and forms of governance matter. While there is much international focus on the renewable and global warming control technologies, this is not at the core of the current challenge. The challenge is to find methods of governance to implement the proven technologies. Both the technologies and the mechanisms exist and are proven; they just must be carefully implemented. And this can be more daunting legally, than initially appears to policy makers.

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[xii] *See* Mark Landler, *Germany Debates Subsidies for Solar Industries*, N.Y. TIMES, May 16, 2008, at C1..

[xiii] *Id.*

[xiv] Fouquet, D., & Johansson, T. B. (2008). European renewable energy policy at crossroads: Focus on electricity support mechanisms. Energy Policy, 36(9), 4079–4092

[xv] Stern Review. (2006). Policy responses for mitigation: Accelerating technological innovation (Part IV, Chapter 16) The economics of climate change. Cambridge, UK: Cambridge University Press.

[xvi] de Jager, D., & Rathmann, M. (2008). Policy instrument design to reduce financing costs in renewable energy technology projects. Utrecht, Netherlands: Ecofys International BV. Prepared for the International Energy Agency, Renewable Energy Technology Development.

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[xviii] Ernst & Young. (2008). Renewable energy country attractiveness indices. London, UK: Ernst & Young.

[xix]Wilson Rickerson et al, Feed-in Tariffs and Renewable Energy in the USA – A Policy Update 10 (North Carolina Solar Center 2008).

[xx] Federal Regulation and Development of Power ("Federal Power Act"), 16 U.S.C. §§ 824d–e.

[xxi] Pub. Util. Dist. No. 1 of Snohomish County Wash. v. Fed. Energy Regulatory Comm'n, 471 F.3d 1053, 1058 (9th Cir. 2006), *vacated on other grounds*, 547 F.3d 1081 (9th Cir. 2008).

[xxii] *Id.* at 1066, *aff'd*, Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County, Wash, 128 S.Ct. 2733 (2008). For a discussion of the California and Western energy crisis that spawned this litigation, see Ferrey, *Soft Paths, Hard Choices: Environmental Lessons in the Aftermath of California's Electric Deregulation Debacle*, 23 VA. ENVTL. L.J. 251 (2004).

[xxiii] *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 214 (1964).

[xxiv] N. States Power Co. v. Minn. Pub. Util. Comm'n, 344 N.W.2d 374, 378 (Minn. 1984).

[xxv] *Pub. Util. Dist. No. 1*, 471 F.3d at 1066; *see also* Entergy La., Inc., v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) (noting that the filed rate doctrine applies to the states through federal preemption).

[xxvi] Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966–67 (1986); Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 371 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."); Entergy La., Inc., v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) (noting that the filed rate doctrine applies to the states through federal preemption); Pub. Util. Dist. No. 1 of Snohomish County Wash. v. Fed. Energy Regulatory Comm'n, 471 F.3d 1053, 1066 (9th Cir. 2006), aff'd in part and rev'd in part, Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County Wash., 128 S.Ct. 2733 (2008). .

[xxvii] Federal Regulation and Development of Power ("Federal Power Act"), 16 U.S.C. 824a. (2006).

[xxviii] Id., 16 U.S.C. § 824a-3(b) (2006) (providing that a rate may not "exceed[] the incremental cost to the electric utility of alternative electric energy"); 18 C.F.R. 292.304(a)(2) (providing that no electric utility shall "pay more than the avoided costs for purchases").
[xxix] *See* Windway Techs., Inc v. Midland Power Coop., 2001 WL 1248741 at *4 (N.D. Iowa 2001) (quoting .16 U.S.C. § 824a-3(b)).
[xxx] Steven R. Miles, *Full-Avoided Cost Pricing Under the Public Utility Regulatory Policies Act: "Just and Reasonable" to Electric Consumers?*, 69 CORNELL L. REV. 1267, 1284 n. 99 (1984) (citing Public Utility Rate Proposals of President Carter's Energy Program: Hearings Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. pt. 1, at 189 (1977)).
[xxxi]In re Fla. Power & Light Co., 219 P.U.R.4th 46, 49 (Fla. Pub. Serv. Comm'n, 2002).
[xxxii] Steven Ferrey, *Net Metering ,in* 1 ENCYCLOPEDIA. OF ENERGY ENGINEERING AND TECH. 1096, 1098 (Barney L Capehart ed., 2007).
[xxxiii] California SB32, which also increased the state cap on the amount of the feed-end tariff from 498.5 Mw to 750 Mw. Liza Weinwimer, "Schwarzenegger Vetoes 33% RPS Bill; Backs Move to Widen Feed-in Tariff Eligibility," Electric Utility Week, October 19, 2009 at 15.
[xxxiv] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).
[xxxv] *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246; *see id*. at 61,246-48.
[xxxvi] *Connecticut*, 70 FERC ¶ 61,012 at 61,029.
[xxxvii] *Connecticut*, 71 FERC ¶ 61,035 at 61,153. *See* Order No. 671, FERC Stats. & Regs. ¶ 31,203 at para. 99 (clarifying that a QF will retain exemption from sections 205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA and distinguishing between a "state regulatory authority's implementation of PURPA" and "state programs that are not grounded in PURPA").
[xxxviii] 18 C.F.R. § 292.304 (2010). Under section 210 of PURPA, the rules prescribed by the Commission shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006). Under the Commission's regulations, absent agreement of the parties to the contrary, rates shall be capped at the electric utility's full "avoided cost." 18 C.F.R. § 292.304 (2010).
[xxxix] Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994).
[xl] S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995).
[xli] Miss. Power & Light Co. v. Miss. *ex rel.* Moore, 487 U.S. 354, 371 (1988).
[xlii] 18 C.F.R. § 292.101(b)(6) (2009).
[xliii] S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215, ¶ 61,666 (1995).
[xliv] *Id*. ¶¶ 61,675–76.
[xlv] Pub. Util. Dist. No. 1 of Snohomish County Wash. v. Fed. Energy Regulatory Comm'n, 471 F.3d 1053, 1066 (9th Cir. 2006).
[xlvi] Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County Wash., 128 S.Ct. 2733 (2008).
[xlvii] Both *P.U.D. No. 1* and *Morgan Stanley* remanded the case to the FERC. *See Morgan Stanley Capital Group*, 128 S.Ct. 2733 (2008).
[xlviii] See also, Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964).
[xlix] Id.
[l] Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765 (1982).
[li] DSIRE SUMMARY TABLES, MARCH 2010. HTTP://WWW.DSIREUSA.ORG/SUMMARYMAPS/INDEX.CFM?EE=0&RE=1
[lii] R. Wiser & G. Barbose, supra, at 10.
[liii] FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS (5th ed. 2010), at chapter 4..
[liv] *See* Environmental Protection Agency, *Addressing Climate Change – Ohio's Role*, available at http://www.epa.state.oh.us/dapc/climatechange/ccohio.aspx (outlining the Ohio Alternative Energy Portfolio Standard).
[lv] *See* DSIRE, Illinois Incentives & Policies for Renewables & Efficiency, available at http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=IL04R&re=1&ee=1.
[lvi] *See* DSIRE, ARIZONA INCENTIVES/POLICIES FOR RENEWABLES & EFFICIENCY, available at http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=AZ03R&re=1&ee=1.
[lvii] *Id.*
[lviii] *See* Texas Utilities Code Ann. §39.904 (Vernon 2007).
[lix] *See* TransCanada Complaint, available at http://www.windaction.org/documents/27061.

[lx] *See Davis*, 128 S. Ct. at 1808-09 (quoting Oregon Waste Systems, Inc. v. Dep't of Envt'l Quality of State of Or., 511 U.S. 93, 100 (1994).
[lxi] *See* Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1807 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988)).
[lxii] *See* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (noting that if a statute is facially discriminatory, it is virtually per se invalid).
[lxiii] *West Lynn Creamery*, 512 U.S. at 204 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 626).
[lxiv] S. Ferrey, Environmental Law: Examples and Explantions, Aspen Publishers, 5th ed., 2010, at chapter 4.
[lxv] 225 C.M.R. 14, 17.
[lxvi] *See* TransCanada Complaint, available at http://www.windaction.org/documents/27061.
[lxvii] Transcanada Power Marketing, Ltd. v. Bowles, et al., C. A. No. 4:10-cv-40070-FDS, (D. Ma. July 2010).
[lxviii] Id.
[lxix] See Massachusetts Dept. of Energy Resources, Partial Settlment Agreement with TransCanada, available at http://www.mass.gov/Eoeea/docs/doer/renewables/solar/Settlement-Agreement.pdf