

GTH UPDATE Energy

FEDERAL DISTRICT COURT DECISIONS ON LOW-CARBON FUEL STANDARDS AFFECT THE PACIFIC NORTHWEST



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Relief for Pacific Northwest renewable generators? Federal district court decisions finding low-carbon fuel standards offer hope for out-of-state generators seeking access to the California market.

On December 29, 2011, the U.S. District Court for the Eastern District of California issued a series of decisions concluding that California's low-carbon fuel standard ("LCFS") discriminates against interstate commerce by applying different regulations to in-state and out-of-state low-carbon fuel producers. Such discrimination against out-of-state producers, the Court concluded, violates the Commerce Clause of the U.S. Constitution. The Court therefore issued an injunction voiding the discriminatory aspects of the LCFS. (*Rocky Mountain Farmers Union v. Goldstene*, Case No. CV-F-09-2234 LJO DLB).

On January 19, 2012, the U.S. District Court for the District of Vermont issued another energy-related decision invoking the Commerce Clause. In that decision, the Court concluded that Vermont could not legally condition its certificates for continued operation of the Vermont Yankee nuclear plant on the availability of below-market contracts to Vermont ratepayers. That requirement amounts to economic protectionism violating the rights of ratepayers in other states served by Vermont Yankee, who would have to pay higher rates if the Vermont rule prevailed. (*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, Docket No. 1: 11-cv-99 (jgm)).

Together, these district court decisions offer hope to renewable energy producers in the Pacific Northwest and elsewhere in the Western Interconnection who have found themselves effectively barred from the lucrative California market. Since passage of SBX2, legislation that formalized California's requirement that 33% of its electric power consumption come from renewable resources by 2020 (the Renewable Portfolio Standard or "RPS") in early 2011, out-of-state producers have found themselves increasingly locked out of the California markets for electricity and renewable energy credits ("RECs"). This is because SBX2

For more information, please contact one of our attorneys:

Eric L. Christensen (bio)
206.676.7539
echristensen@gth-law.com

Durham C. McCormick (bio)
206.676.7584
dmccormick@gth-law.com

Don Cohen (bio)
206.676.7531
dcohen@gth-law.com

Seattle: 206.676.7500
Tacoma: 253.620.6500
Toll-free: 800.240.5051

www.gth-law.com

imposed difficult-to-meet delivery requirements on bundled electricity/REC transactions originating outside the state and also imposed stringent limits on the amount of REC-only purchases California utilities can use to comply with the RPS standards.

The district court decisions raise serious doubts about the validity of California's approach, which many outside producers believe has been used purposefully to favor California's influential in-state renewables producers. For example, the California District Court held that "California is attempting to stop leakage of [greenhouse gas] emissions by treating electricity generated outside the state differently than electricity generated inside its border. This discriminates against interstate commerce," and therefore violates the Commerce Clause. Further, the LCFS struck down by the California District Court is, in its details, strikingly similar to the discriminatory RPS rules. For example, the LCFS standards, like the RPS rules, places specific restrictions on low-carbon fuels produced outside California that are not applied to California producers, or are applied in a different manner. Such discrimination, the Court concluded, violates the Commerce Clause.

While these court decisions provide strong support for the idea that the RPS regime is unconstitutional to the extent it treats out-of-state renewable producers differently than in-state producers, the decision has proven controversial. Already, a number of parties have filed petitions for review of the California District Court's decisions in the Ninth Circuit.

The attorneys at Gordon Thomas Honeywell have extensive experience in all areas of the energy and utility industries, including regulatory matters, project development, renewable energy, power purchase agreements, REC purchase agreements, transmission, taxation, municipal law, cooperative law, public records requests and general operations.

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Gordon Thomas Honeywell
600 University Street, Suite 2100, Seattle, WA 98101
1201 Pacific Avenue, Suite 2100, Tacoma, WA 98401



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