Implications of the Interstate Commerce Clause for State Solar RPS Programs

Renewable Energy Markets Conference

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SunEdison company overview

We develop, build, finance, own and operate solar power plants in order to deliver solar services / sell commercial retail electricity at competitive prices

Pioneer solar systems and services provider
- First to develop PPA concept for solar (no customer capital outlays and a predictable energy price over 20 year service contract)
- Built first utility scale plant in the U.S and Canada
- Currently building Europe’s largest solar power plant – 72MWs

The largest solar energy services provider in North America
- Over 130 MW of renewable electricity under management
- 325+ projects in 11 states plus Canada, Spain, Italy
- Tracking 4 GW in project development

Core competencies and key advantages:
- Financing capabilities enable project growth - $1B in financing to date
- Subsidiary of MEMC (NYSE: WFR), a Fortune 1000 company
- Internal R&D to optimizes system design and production
- Leading monitoring technology to maximize uptime and production
- Regulatory leadership to enable solar markets
Presentation Overview

- Dormant Commerce Clause explained
- Geographic preferences in state solar RPS programs
- Business perspective on Commerce Clause risk
Dormant Commerce Clause

- **Power reserved to Congress to regulate commerce between the States**
  - Nation as an integrated economic unit
  - Prevents states from erecting barriers that would inhibit the free flow of commerce across state lines

- **Supreme Court jurisprudence**
  - Does the law draw a distinction based on the state of origin of the product or service?
    - Facial discriminatory laws – “virtually per se invalid”
      - Absolute restriction to state market not required
      - Additional costs, burdens or disadvantages
    - Discrimination in practical effect – Generally upheld under *Pike* balancing test where:
      - Burden on interstate commerce is incidental
      - Law seeks to promote a legitimate local interest
State Solar Carve-Out Eligibility Restrictions

- **Eligibility defined by location of renewable resource**
  - Program restricted to in-state generation (e.g., MA)
  - Specified percentage (e.g., 50%) from in-state facilities
- **Preference for in-state renewable resources**
  - Credit multipliers
  - Default to neighboring states if in-state RECs not available
- **Deliverability restrictions**
  - Resources within ISO region
  - Demonstration of ability to displace conventional resources otherwise used to meet in-state load
  - Resource connected to distribution system serving the state
State Interests Served through Solar Carve-Outs

- State solar carve-outs generally require a premium above conventional generation and Class I RECs
- This premium is often justified based on unique local benefits of solar resource:
  - Displacement of conventional fossil generation
  - Local air quality and associated public health benefits
  - Avoidance of peak energy/demand charges
  - Grid reliability benefits and deferral of distribution system costs
  - Promotion of in-state jobs and local green economy
- Constitutionality turns on the legal *legitimacy* of these local interests
- Divining legislative intent
TransCanada Challenge

- Facial challenge to two elements of the MA Green Communities Act limiting eligibility to resources located in the Commonwealth:
  - Utility long-term contracting requirement for Class I RECs
  - Solar carve-out
- TransCanada’s interests implicated:
  - As wind developer
  - As retail electric supplier
- Recent developments
  - Partial settlement reached on solar carve-out
    - Suppliers subject to lower Class I ACP (~$61) in lieu of much higher SACP rate ($600) for grandfathered load
  - DPU suspends operation of geographic limitation for renewable LTC RFP
    - Emergency rules issued to remove offending language
    - Utilities reopen RFPs to allow bids from out-of-state renewable generators
    - Litigation proceeds with oral arguments on 10/15/10
Evaluating DCC Risks

- **Legal risk**
  - Intrinsic vulnerability of state law/regulation under DCC?
  - Likelihood of challenge?

- **Political risk**
  - Depth of legislative support for RPS?
  - Subject other elements of RPS to adjustment?

- **Business risk**
  - Evaluation of viability of new markets?
  - Implications for existing commercial contracts?
Questions?

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