



CASE SUMMARY

IMPLICATIONS FOR STATE RPS PROGRAMS OF
ILLINOIS COMMERCE COMMISSION ET AL. V.
FEDERAL ENERGY REGULATORY COMMISSION,
DOCKET NO. 11-3421 *ET AL.*, (7TH CIR. JUNE 7, 2013)

Prepared for the
State-Federal RPS Collaborative

by

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Introduction

A recent Seventh Circuit decision, *Illinois Commerce Commission v. FERC*, Docket No. 11-3421 (7th Cir. June 7, 2013) questioning the constitutionality of Michigan’s renewable energy portfolio standard (RPS) has several states wondering about the importance of the decision and potential consequences for their own RPS programs. In the short-term, the Seventh Circuit’s decision has no real-world or immediate implications for state RPS programs. Significantly, the court *did not* invalidate the Michigan RPS program, referenced the program’s Commerce Clause infirmities in non-precedential dicta and arguably lacked jurisdiction to raise the constitutional issues at all because that they were not presented by any of the parties.

In the long run, however, states should not ignore this decision because it confirms that broad location-based restrictions on RPS eligibility are constitutionally vulnerable. It’s not so much that this ruling will invite lawsuits— after all, these Commerce Clause problems with some RPS programs have been known for years, but the high cost of litigation has and will continue to insulate most programs from challenge. Rather, the real danger for states that fail to cure constitutional problems in RPS programs is that regional transmission organizations may use this decision as license to exclude constitutionally suspect state “public policy objectives” from consideration in the Order No. 1000 transmission planning and cost allocation process.

Because judicial decisions can be dense, I’ve fashioned this case summary as a series of questions and answers.

What is *Illinois Commerce Commission (ICC) v. FERC* about?

ICC v. FERC is a cost allocation rate case; one of the many contentious battles over appropriate assignment of costly transmission expansion projects.

In 2011, FERC approved the Midwest ISO's proposal to regionally allocate the costs of multi-value transmission projects (MVPs) (*i.e.* projects that provide multiple system benefits, such as increased reliability and efficiency and lower costs) that would deliver wind power throughout the region. Multiple parties appealed, arguing that MISO's formula for assigning costs –which was based on a utility's share of total regional wholesale electricity consumption rather than on customers' proximity -- violated principles of cost-causation by disproportionately saddling some ratepayers with the cost of new transmission even though they did not enjoy commensurate benefits.

The court rejected the challenges, finding that FERC's "crude" assessment of the benefits of the MVP projects to utilities throughout the region "would have to suffice." [Slip Op. at 14] The court also acknowledged the benefits that an influx of wind power from more remote locations could bring to the region by replacing more expensive local wind power and reliance on oil and coal. [Slip Op. at 13]

How did the Commerce Clause come up in the context of a cost allocation case?

Somewhat indirectly!

Various Michigan parties (regulators and utilities) explained that Michigan's RPS requires utilities to rely only on in-state resources to meet RPS obligations. Consequently, Michigan consumers do not enjoy any benefits from the MVPs since they deliver wind power from out of state that cannot be used to satisfy the Michigan RPS – and therefore, they do not deserve to shoulder 20 percent of the MVP costs.

The court rejected Michigan's argument, finding that it "trips over an insurmountable constitutional objection." The court explained that

"Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy." Slip Op at 15.

What does the Michigan RPS statute provide?

Michigan's RPS eligibility may have raised some concerns with the court because of somewhat overt locational requirements. The relevant provision, MCLS §460.1029, is entitled "Renewable Energy System location" and requires eligible facilities to either be located within the state, or outside the state if within the territory of a utility that is not an alternative electric supplier. The statute also gives an enhanced credit for each megawatt hour of a project made in the state or by in-state workforce.

What is the impact of *ICC v. FERC* on Michigan's RPS program?

None. Michigan's current RPS program remains intact because the constitutionality of Michigan's program was not before the court. Although the court referenced the constitutional problems with the Michigan RPS, it did so only to rebut/reject Michigan's arguments that its consumers would not benefit from the MVP program (because out of state wind could not be used to satisfy the RPS). None of the parties challenged Michigan's RPS in the context of the case, which after all, involved a FERC cost-allocation decision.

What are the legal implications of *ICC v. FERC* in future cases?

Legally, the court's ruling on the constitutional issues in *ICC v. FERC* has no precedential value and will not bind future decisions.

- **First, the court's commentary on the constitutionality is dicta.** The constitutional issues are not relevant to the holding of this case, which is that FERC's approval of a cost allocation formula based on a "crude" assessment of benefits is entitled to deference. To reach this holding, the court found that the MVPs would result in regional benefits such as reliability, efficiency and increased integration of wind from remote locations which would reduce the cost of wind and eliminate reliance on oil and coal. Neither FERC nor the court identified meeting state RPS as a benefit of MVPs – and therefore, the fact that Michigan consumers cannot count RPS compliance as a benefit is simply irrelevant in the context of the holding of the case.
- **Second, the court arguably lacked jurisdiction to raise constitutional issues.** Jurisdiction of appellate courts, particularly over review of FERC decisions or in addressing constitutional issues is tightly circumscribed. Under Section 313 of the Federal Power Act, courts only have jurisdiction to address issues raised before FERC by the parties, and none of the parties objected to Michigan's program on Commerce Clause grounds. Moreover, jurisprudential considerations counsel courts to avoid reaching constitutional arguments where a matter can, as here, be resolved on other grounds.

Will *ICC v. FERC* invite future litigation on RPS programs?

No more so than present. For some time, multiple commentators have opined that state RPS programs with overt locational restrictions on eligibility are constitutionally vulnerable. But a combination of factors - cost of RECs/RPS compliance low and multiple opportunities for renewable developers to take advantage of RPS programs in other states – few parties were motivated to bring challenges. In my view, this case is unlikely to give companies any more motivation to challenge Michigan's RPS statute. As for challenges elsewhere, many state programs are not quite as restrictive as Michigan – so even the court's dicta would not necessarily help in other jurisdictions.

On the other hand, this case has been the subject of many media stories – and it is possible that the increased publicity could either enlighten some RPS opponents who were previously unfamiliar with

Commerce Clause vulnerabilities in RPS statutes or embolden other groups that have considered challenges in the past to move ahead.

Given that *ICC v. FERC* has few implications, does that mean that states with vulnerable RPS programs should do nothing?

No. For states that believed that RPS programs are not subject to the Commerce Clause at all, *ICC v. FERC* is a reminder that they are, and offers insight as to how courts may view the issue when it comes before them. The CESA report that I co-authored with Ed Holt, *The Commerce Clause and Implications for State Renewable Portfolio Standard Programs* (Montpelier, VT: Clean Energy States Alliance, 2011), offers some suggestions on how states might reduce litigation risk with respect to their RPS programs.

Moreover, even if judicial challenges are unlikely, states should revisit programs for another reason. *ICC v. FERC* preceded Order No. 1000, which affirmatively requires RTOs and ISOs to take state public policy into account in transmission planning and to allocate costs based on benefits received from transmission policy. Perhaps a state has an RPS carve out policy to encourage DG (which may promote reliability and avoid transmission) – but the policy is drafted in a manner that makes it constitutionally suspect. An RTO might ignore a state’s policy, claiming that it is not a valid public policy in light of the *ICC* ruling – and build additional transmission and require the DG state to shoulder the cost even though the state’s DG policy means that it might not benefit as much from the program. In short, if states want to see their public policies duly represented in the transmission planning process in Order No. 1000, they should ensure that they are constitutionally compliant.

In addition, in some jurisdictions, the cost of RPS compliance in some states may increase as requirements grown more stringent. At that point, states with constitutionally questionable RPS provisions might expect challenges and should bulk up their statutes now to stand ready.

About the Author

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