

ANNUAL REPORT OF RENEWABLE ENERGY COMMITTEE

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While, technically, the renewable energy movement is four decades old, dating from the 1970's energy crisis, few will dispute that certain of the hallmarks of the current renewable energy initiative are different in substance and kind. Among the notable differences are the dominant role Climate Change concerns play, the new breed of capital markets available for renewables initiatives and parallel regulatory initiatives, including renewable portfolio standards. For this reason, this year's report focuses on two measures that allow different perspectives. The first, the changes in state regulatory initiatives designed to foster renewables, identifies the rapidly evolving, still legal framework of the renewables sector. The second, federal and state court decisions, identifies the issues of importance to practicing attorneys in the renewables sector. For purposes of this report, renewable energy is defined broadly to include technologies such as large-scale hydro and waste-to-energy facilities which may not be included in all definitions of the term "renewable energy."

Recent Project Development Activity Involving Renewable Energy

Renewable energy development, at the state and project level, has continued to see a surge in interest, and to a lesser degree, in project development in 2007. At the state level, mandatory renewable portfolio standards and associated aspirational goals are now commonplace, particularly among east coast and west coast states. Thus, for instance, at year end, Hawaii proposed to have 70% of its energy needs met by renewable technologies by 2030, through a partnership with the U.S. Department of Energy, although via a non-binding memorandum of understanding.

In addition, in 2007, fourteen other states adopted or amended laws relating to renewable portfolio standards ("RPS"), although often using a different descriptive term. Many either made formerly voluntary programs mandatory or heightened the in-place RPS standards, bringing to 29 the number of states that have developed renewable energy portfolio programs, educational initiatives or goals.¹ Significant recent legislation that we identified includes the following:

Colorado: (1) doubled the state's existing RPS, requiring certain qualifying retail utilities to obtain 20% of their electricity supplies from renewable sources by 2020 (4% of which must come from solar-electric technologies) under a stepped process, and (2) set a 10%

¹ Legislation as described at http://www.pewclimate.org/what_s_being_done/in_the_states/rps.cfm last visited on February 1, 2008. See web site for additional information about state activities regarding renewable energy.

RPS for certain of the state's municipal and cooperatives electric associations. Sources of energy that count toward the Colorado RPS standard include certain fuel cells, solar, wind, geothermal, certain biomass, certain recycled energy, new small-scale hydroelectric and certain existing hydroelectric.²

Connecticut expanded the state's existing RPS, requiring approximately 25% of the state's electricity to come from renewable sources by 2020, with different standards for three classes of renewables, as follows: (1) 20% of the renewables must be from Class I (i.e., fuel cells, solar, wind, certain biomass, certain landfill gas, "low emission advanced biomass conversion technologies," ocean, hydrogen, and certain new small-scale hydroelectric); (2) 3% must be from Class I or II (i.e., certain trash-to-energy and biomass not included in Class I, and certain hydropower); and (3) 4% must be from Class III (i.e., customer-sited combined heat and power systems with a minimum operating efficiency of 50 percent installed at commercial or industrial facilities on or after January 1, 2006; electricity savings from conservation and load management programs that started on or after January 1, 2006; and systems that recover waste heat or pressure from commercial and industrial processes installed on or after April 1, 2007). Connecticut municipal electric utilities must also develop RPS standards.³

Delaware amended an existing RPS, known as the Renewable Energy Portfolio Standards Act ("REPSA"), to increase the target percentage of electricity supply that must come from renewable sources from 10 to 20% by 2019, and specified that 2% of that revised total must be from solar or photovoltaic sources. The REPSA includes an alternative compliance payment, defined as "payment of a certain dollar amount per megawatt hour, which a retail electricity supplier or municipal electric company may submit in lieu of supplying the minimum percentage from Eligible Energy Resources" Eligible Energy Resources include certain fuel cells, solar, photovoltaics, wind, geothermal, biomass, landfill gas, ocean, anaerobic digestion and small-scale hydroelectric.⁴

Illinois set a statewide RPS, known there as a Renewable Energy Standard ("RES"), under which certain utilities in Illinois must obtain a certain percentage of their power from renewable sources, starting with 2% in 2008 and increasing to 25% by 2025. Seventy-five percent of the electricity used to meet the RES must come from wind sources; other eligible electricity resources include solar, biomass, biodiesel, existing hydroelectric and "other alternative sources of environmentally preferable energy." The law also includes an efficiency standard that requires utilities to implement energy-efficiency measures to reduce electric usage by 2% of demand by 2015.⁵

Maine amended its: (1) initial RPS, which required certain competitive electric suppliers to ensure that 30% of Maine's power come from renewable sources (e.g., fuel cells, certain ocean, solar, wind, geothermal, hydroelectric, biomass, and certain biomass) by 2000; and (2) second-generation RPS goal to increase new (defined as "in service" after September 1, 2005) renewable energy capacity by 10% by 2017. These requirements are now mandatory, and sources that satisfy the new capacity requirement cannot also be used to satisfy the 30% portfolio requirement. The Maine program does provide for alternative compliance payments in certain circumstances.⁶

² Col. Rev. Stat. § 40-2-124

³ 2007 Conn. Acts No.P.A. 07-242

⁴ Del. Code. tit 26 §§ 351-63

⁵ 2007 Ill. Laws P.A. 095-0481

⁶ Me. Rev. Stat. Ann. tit. 35-A § 3210

Maryland has a two-tiered definition of qualifying renewables. Maryland expanded its existing RPS to require that 2% of the state's electricity supply come from solar sources by 2022, in addition to 9.5% from other renewable sources known as Tier I sources by the same date, with a stepped process requiring smaller percentages through 2022. Other sources of energy that count toward the Tier I RPS standard include certain fuel cells, wind, certain biomass, methane from certain landfills or wastewater treatment plants, geothermal, ocean, and certain hydroelectric. Through 2018 2.5% must come from the Tier II sources.⁷

Minnesota required certain electric utilities to ensure that 25% of Minnesota's power comes from renewable sources by 2025. A heightened standard is created for utilities that own nuclear generating sources. Sources of energy that count toward the standard include solar, wind, small-scale hydroelectric, hydrogen (from renewable resources), and certain biomass.⁸

Missouri created a voluntary renewable energy objective, requiring every utility to make a "good-faith effort" to supply 11% of their electricity with renewable sources by 2020. Sources of energy that count toward the objective include solar, wind, hydroelectric, hydrogen (from renewable resources), and biomass, although flexibility is provided to the state regulator to include additional sources of renewable energy. The law also contemplates that not all renewable technologies will be equally weighted. Utilities can also earn credit towards the objective through energy efficiency measures that include utility and consumer efforts to reduce the consumption of electricity.⁹

North Carolina established an RPS, known there as a Renewable Energy and Energy Efficiency Portfolio Standard ("REEEPS"), requiring public utilities to meet 12.5% of retail electricity demand through renewable energy or energy efficiency measures by 2021, and electric membership corporations and municipalities that sell electric power in the state would have to meet a standard of 10% by 2018. Resources that can be used to meet the REEEPS include solar, wind, certain hydroelectric, geothermal, ocean, hydrogen and certain biomass. REEEPS also can be met through certain energy-efficiency measures. The law also includes provisions to encourage the use of solar and certain agricultural biomass technologies.¹⁰

New Hampshire established an RPS that approximately 25% of the state's electricity come from renewable sources by 2025, of which approximately 16% is to be derived from sources installed after January 1, 2006, known as "Class I" sources. Sources of energy that count toward the "Class I" RPS include wind, solar, geothermal, certain hydrogen, methane, ocean, certain biomass, and existing small-scale hydroelectric.¹¹

New Mexico established an RPS that by 2020, 20% of an electric utility's power come from renewable sources, unless costs are determined to be unreasonable. Rural electric cooperatives have an alternative and lower RPS standard. The RPS standards also contain diversification requirements, so that various renewable technologies must be employed. Sources of energy that count toward the RPS include "electrical energy generated by means of a low or zero emissions generation technology with substantial long-term

⁷ Md. Code Ann. Pub. Util. Cos. §§ 7-701, 7-703

⁸ 2007 Minn. Sess. Laws ch. 3

⁹ 2007 Mo. Laws S.B. 54

¹⁰ 2007 N.C. Sess. Laws 397

¹¹ N.H. Rev. Stat. ch. 362-F

production potential,” such as certain fuel cells, solar, wind, hydroelectric, geothermal, and certain biomass.¹²

Oregon adopted a tiered RPS system, with tiers determined by utility size and in which the state’s largest utilities to meet 25% of their electric load with new renewable energy sources by 2025. Smaller utilities are subject to lower RPS standards. The Oregon program does provide for alternative compliance payments and exemptions in certain circumstances. Sources of energy that count toward the RPS include wind, solar, ocean, geothermal, biomass, certain new hydroelectric or efficiency upgrades to existing hydroelectric facilities.¹³

Texas repealed a provision (included in its existing RPS law), known as "Subsection (m)," that required all renewable energy generated in Texas, even that associated with voluntary purchases, to count toward compliance with the state mandate.¹⁴

Virginia established a voluntary renewable energy target of 12% of base year sales by 2022. The standard targets are defined as percentages of 2007, i.e., the “base year,” electricity sales less the average annual percentage of power supplied from nuclear generators between 2004 and 2006. A utility may participate in the voluntary RPS program if it demonstrates that it has a reasonable expectation of achieving the 12% target in 2022. Sources of energy that count toward the RPS target include solar, wind, geothermal, certain hydroelectric, ocean, and certain biomass. Wind and solar receive a double credit toward RPS goals.¹⁵

Judicial Decisions Involving Renewable Energy and Climate Change

Of the decisions concerning that were issued in 2007, the majority involved commercial and do not necessarily address issues that are unique to renewables. The following decisions, however, may have broader implications for the renewables sector, particularly the future of mandatory RPS, the value of renewable energy credits and Climate Change concerns.

Climate Change

Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie,¹⁶ and *Central Valley Chrysler-Jeep, Inc. v. Goldstone*,¹⁷ twin decisions concerning the fate of the California Air Resources Control Board (“CARB”) regulations governing vehicular emissions of greenhouse gases (“GHGs”), mark the next steps in the implementation of *Massachusetts v. EPA*,¹⁸ respectively in Vermont and California. The arguments advanced by a group of industry auto dealers and manufacturers in each case were substantially similar, focusing on the pre-emptive effect on the CARB regulations of the Energy Policy and Conservation Act (“EPCA”) and the Clean Air Act (“CAA”), among other arguments. The results were not, at least initially. The Vermont U.S. District Court conducted a 16-day bench trial, and issued a 240-page opinion, in which it concluded that CARB standards amounted to

¹² N.M. Stat. §§ 62-16-4, 62-16-3

¹³ 2007 Or. Laws ch. 301

¹⁴ Texas Acts 2007, 80th Leg. R.S. ch. 1013

¹⁵ 2007 Va. Acts ch. 933

¹⁶ 508 F. Supp. 2d 295 (D. Vt. 2007)

¹⁷ No. CV-F-04-6663 AWI LJO, 2007 WL 4372878 (E.D. Cal. Dec. 11, 2007)

¹⁸ 127 S.Ct. 1438 (2007)

federal law and therefore the preemption doctrines did not apply and, in any event, were not preempted. Although initially finding some preemptive effect, the California U.S. District Court treated the intervening *Massachusetts v. EPA* decision as a change in controlling law and ultimately reversed its preemption finding. In its reevaluation, it, albeit on different grounds, with the Vermont federal court, concluding that California, through the waiver process of CAA, § 209 that produced the CARB standards, was empowered to issue those standards effectively limiting GHGs from motor vehicles, and that those standards were not preempted by EPCA or by any other federal laws.

Renewables Funding & Competition

Reilly v. U.S. Department of Energy,¹⁹ involved a challenge to the U.S. Department of Energy's ("DOE") administration of its competitive Energy Efficiency and Renewable Energy ("EERE") program, although the dispute was resolved in the context of the Freedom of Information Act ("FOIA") challenge. Plaintiff Reilly sought, and the federal district court declined to allow, information relating to DOE's decision-making in declining to provide the identities of the participants on the Merit Review Committee that oversaw DOE's EERE decision and allocation of coveted DOE funding.

Renewable Energy Credits, their Value & Ownership

In *Minnesota Methane, LLC v. Department of Public Utility Control*,²⁰ the Connecticut Supreme Court affirmed a Department of Public Utility Control ("DPUC") determination that the Connecticut Light and Power Company, a public utility, had acquired renewable energy certificates ("RECs") as part of its purchase of the "entire electrical output" of a landfill gas-to-electricity facility. While the court concluded that the New England Power Pool REC accounting process "unbundled" the renewable and electricity attributes, allowing them to be traded separately, it nonetheless determined that the utility had obtained these RECs through its historic standard form contract that antedated the creation of RECs. The court also declined to conclude that the seizure of the RECs amounted to an unconstitutional taking under the Connecticut constitution.

The companion case of *Wheelabrator Lisbon, Inc. v. Department of Public Utility Control*,²¹ contains the more detailed reasoning for the case. In particular, the court reasoned that the interpretation of the standard form contract was not a purely contractual matter in which the parties' respective intents were to be discerned, but "more a question of legislative intent and public policy." The court concluded that deference was due to the regulator and that the regulator had appropriately determined that the term "electricity" included the RECs.

In *New Mexico Industrial Energy Consumers v. New Mexico Public Regulation Commission*,²² the Supreme Court of New Mexico vacated a decision of the New Mexico Public Regulation Commission ("PRC") allowing the El Paso Electric Company ("EPE"), an electric utility, to recover the costs of acquiring REC's (but not the underlying electric energy) through an automatic adjustment clause, which allows the utility to recover the cost of "purchased power" or costs "closely related

¹⁹ No. 07-C-995, 2007 WL 4548300 (N.D. Ill. Dec. 18, 2007)

²⁰ 931 A.2d 177 (Conn. 2007)

²¹ 931 A.2d 159 (Conn. 2007)

²² 168 P.3d 105 (N.M. 2007)

to purchased power.” The PRC found that RECs were closely related to “purchased power,” reasoning that EPE was required to comply with a renewable portfolio standard and should not be adversely affected because it satisfied those requirements by the acquisition of RECs. The court disagreed, noting several admissions against interest to the effect that RECs did not amount to “purchased power.” The court concluded that EPE never purchased the “power” associated with the RECs and, having made that decision, could not construe its RECs as such.

In *In re Ownership of Renewable Energy Certificates*,²³ the New Jersey Appellate Court considered consolidated appeals regarding the ownership of RECs under the existing long-term contracts between utilities and that did not contemplate their creation and were approved by the New Jersey Board of Public Utilities (“BPU”). The court assigned ownership to the purchasing utility, rather than the REC generator.

Interpreting RPS Obligations

In *Pennsylvania Power Co. v. Public Utility Commission*,²⁴ the Pennsylvania Commonwealth Court interpreted the implementation of the Alternative Energy Portfolio Standards, Act (“AEPS”), considering whether the Pennsylvania Public Utility Commission (“PUC”) could, within the scope of a proposed cost-recovery action, deny Pennsylvania Power (“PP”), an electric utility, the right to meet the requirements of AEPS by purchases from renewable energy facilities located outside Pennsylvania to satisfy the AEPS. The court rejected the PUC’s interpretation of the AEPS.

In *In re Application of Detroit Edison*,²⁵ the Michigan Court of Appeals found that the Michigan Public Service Commission (“PSC”) lacked authority, under applicable state law, to allow a public utility, the Detroit Edison Company (“DEC”), to charge customers a fee to defray the cost of its renewable energy program (“REP”), because the REP was voluntary and the ability to charge a fee was not contemplated by the Legislature when it authorized the PSC to “establish rates, terms, and conditions of electric service that promote and enhance the development of new energy technologies.”

Opposing Renewable Energy Projects

In *Burch v. Nedpower Mount Storm, LLC*,²⁶ the West Virginia Supreme Court of Appeals accepted a nuisance claim by landowners seeking to recover against, and also to enjoin, a wind power project. The court concluded that issuance of a sitting certificate by the state Public Service Commission (“PSC”) did not eliminate the court’s jurisdiction to hear the landowner’s common law nuisance claims, and that the landowner’s sound allegations was cognizable as a nuisance claim, both allowing compensation based on diminution in property value and providing a basis for an injunction, although the Supreme Court of Appeals did not reach the merits. The court remanded to the trial court for determination consistent with its ruling.

²³ 913 A. 2d 825 (N.J. Super. 2007)

²⁴ 932 A. 2d 300 (Pa. Commw. Ct. 2007)

²⁵ 740 N.W. 2d 685 (Mich. 2007)

²⁶ 647 S.E. 2d 879 (W. Va. 2007)

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