Renewable Portfolio Standards Among the New England States: How About Some Good Old-Fashioned Yankee Regionalism?
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I. Dormant Commerce Clause

A. The Basic Doctrine

Congress has the power to “regulate Commerce . . . among the several States . . . .”\(^1\) Implicit from this power is the Dormant Commerce Clause (DCC), which recognizes that states cannot withdraw from interstate market competition, and retain limited powers to regulate in a manner that impedes commerce from other states. The DCC thus serves as a judicial sword to cut down state actions burdening the free flow of goods and services among states, and in this manner promotes the national economy by curtailing state protectionism.\(^2\) State actions that facially discriminate against out-of-state commerce are *per se* invalid,\(^3\) and actions that place an incidental burden on interstate commerce in a manner “clearly excessive in relation to the putative local

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1 U.S. CONST. art. I, § 8, cl. 3.


benefits” are similarly impermissible. The Supreme Court has exercised the DCC power to strike down state actions blocking interstate trash disposal, prohibiting out-of-state wine shipments, and banning oversized trucks, while upholding laws mandating packaging requirements for cantaloupe, banning milk sold in non-returnable plastic containers, and enforcing a bait fish quarantine.

B. RPS and the DCC

Dormant commerce clause concerns pervade RPS literature. The attention is

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understandable considering interstate electricity transmission triggers the DCC\textsuperscript{12} and the Supreme Court has struck down state attempts to retain local electric generation benefits.\textsuperscript{13} RPS policies that go too far trying to promote in-state renewable growth are clearly vulnerable to legal challenge.\textsuperscript{14} In response, some have called for a revamped DCC doctrine to accommodate state regulatory efforts in the energy and environmental areas.\textsuperscript{15} Others cite the potential for constitutional challenges to undermine state RPS efforts as grounds for a national RPS.\textsuperscript{16}

In an attempt to capture environmental and economic benefits, many states have crafted less-than-prescient RPS schemes that favor in-state generators over out-of-state generators.\textsuperscript{17} Not all states do this in the same way. In-state preferences typically

\begin{itemize}
  \item \textsuperscript{12} See New York v. F.E.R.C., 535 U.S. 1, 16 (2002) ("[W]e agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce.").
  \item \textsuperscript{13} New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) (striking down New Hampshire commission’s order that prohibited the sale of hydroelectric electricity outside the state as “precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states.").
  \item \textsuperscript{14} See Am. Tradition Inst. v. Colorado, 876 F. Supp. 2d 1222, 1226 (D. Colo. 2012) (concluding conservative nonprofit had standing to challenge Colorado renewable electricity standards);
  \textit{Massachusetts Abandons In-state Requirement}, 3976 PUR UTIL. REG. NEWS 4, June 25, 2010 (reporting on lawsuit filed by TransCanada challenging regulations that required long-term renewable contracts be solicited from generators within Massachusetts) [hereinafter \textit{Mass. Abandons Requirement}].
  \item \textsuperscript{16} Davies, \textit{supra} note \texttt{Error! Bookmark not defined}., at 1368.
  \item \textsuperscript{17} Ferrey, \textit{Threading the Needle, supra} note 11, at 86.
\end{itemize}
involve some combination of crediting only in-state renewables to create valid RECs, in-
state or in-region transmission connection requirements, in-state credit multipliers, or subsidies that make in-state renewables cheaper. Nuances among state RPS requires a case-by-case analysis into each program’s propriety under established DCC law.

But an RPS that explicitly favors in-state renewable generators is almost certainly invalid under the DCC. Ohio requires that at least half of renewable electricity used to meet RPS come from within the state. This facially discriminates against out-of-state renewable energy simply because of its origin. Despite the Supreme Court’s admonition that such protectionism is per se invalid, similar provisions remain on the books in California, Colorado, and North Carolina. In a case primarily concerning FERC cost allocation, Michigan argued that out-of-state wind power could not be used to meet RPS obligations. Judge Posner swiftly swatted that argument: “Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-

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18 Id. at 86-87.
19 Davies, supra note Error! Bookmark not defined., at 1368 (noting Arizona provides extra compliance credit for facilities constructed in the state).
20 Endrud, supra note Error! Bookmark not defined., at 265 (pointing to Massachusetts as an example).
21 Ferrey, Threading the Needle, supra note 11, at 98-99.
22 Endrud, supra note Error! Bookmark not defined., at 271.
23 OHIO REV. CODE ANN. § 4928.64 (West 2013).
24 City of Philadelphia, 437 U.S. at 624.
of-state renewable energy.”

C. Suits Challenging State RPS to Date

While commentators noted the constitutional conflict between state RPS designs and interstate commerce as early as 1999, the first significant challenge did not occur until 2010 in TransCanada Power v. Bowles. TransCanada filed suit against Massachusetts alleging that Section 83 of the Green Communities Act, limiting competition for long-term contracts to in-state renewable generators, was facially discriminatory and thus invalid under the DCC. TransCanada also attacked carve-out provisions of the Massachusetts REC program requiring utilities to purchase in-state solar RECs. TransCanada sought to compete for the long-term contracts with its Kibby Wind Power Facility in Maine and argued that solar REC purchasing requirements artificially inflated REC prices, undermining the statute's legislative purpose.

The Massachusetts Department of Public Utilities (DPU), acting pursuant to a statutory escape hatch, issued emergency regulations effectively repealing the in-state

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27 Id.

28 Engel, supra note 11, at 288-94.

29 Mass. Abandons Requirement, supra note 14 (discussing suit by TransCanada challenging regulations that required long-term renewable contracts be solicited from generators within Massachusetts).


31 Id.

32 Id.
restriction. The solar carve-out challenge was settled separately. The disposition thus avoided a judicial precedent, but that the DPU suspended the in-state requirement and settled as quickly as it did shows regulators know discriminatory designs are vulnerable.

There have been other suits in Colorado, Missouri, California, New Jersey, and New York. An appellate court has yet to strike down a state RPS program, but with challenges pending and others likely, this could soon change. What this means for the New England states and how a regional RPS could capture local benefits while avoiding constitutional problems will be examined below.

**ANALYSIS**

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35 Ferrey, *Threading the Needle*, supra note 11, at 92.

36 See Lee & Duane, *supra* note 11, at 315.


40 Ferrey, *Threading the Needle*, *supra* note 11, at 95.

41 *Id.* at 96-97.

42 See infra Part **Error! Reference source not found.**
II. **RPS Across the New England States**

Massachusetts, Rhode Island, Connecticut, Vermont, New Hampshire, and Maine all have some form of RPS and trade RECs through NE-POOL. The New England states clearly pay attention to one another in energy markets and RPS policy, and thus there is precedent for cooperation: Vermont looks to prices across the region;\(^{43}\) Rhode Island’s RPS statute preamble cites Massachusetts and Connecticut RPS as inspiration.\(^{44}\)

**A. Qualifying Renewables**

Most of the states categorize the same sources as renewable: solar photovoltaics, solar thermal electric, wind, landfill gas, biomass, geothermal, fuel cells, and hydroelectric (with important qualifications).\(^{45}\) The devil is in the details.

Only Connecticut, New Hampshire, \(^{46}\) and Maine credit CHP/cogeneration in their RPS programs.\(^{47}\) CHP stands for “combined heat and power,” and the technology is

\(^{43}\) VT. STAT. ANN. tit. 30, § 8005B (West 2013) (calling for a “comparison of Vermont’s electric rates with electric rates in other New England states”).

\(^{44}\) R.I. GEN. LAWS ANN. § 39-26-1(d) (West 2013) (“Massachusetts, Connecticut, and other states have established renewable energy standard programs to encourage the development of renewable energy sources.”).


\(^{46}\) N.H. REV. STAT. ANN. § 362-F:2, XV-a.

\(^{47}\) *Database of State Incentives for Renewables and Efficiency*, U.S. DEPT. ENERGY, http://www.dsireusa.org/ (last visited Nov. 22, 2013) (follow the links to each state from the map, then click “Renewables Portfolio Standard” to see “Eligible Renewable/Other Technologies”).
used in facilities that produce steam heat as a byproduct of generating electricity. The thermal energy can then be used by nearby buildings as steam or hot water. Using cogeneration power to satisfy RPS is controversial because in reality, the technology makes traditional fuels more efficient rather than generating energy from an independent “renewable” source.

In all the New England states, RPS eligibility has not been static; inclusions, exclusions, and regulatory treatment of these sources are in flux. Connecticut will move towards assigning less credit to biomass and landfill gas in 2014, and may broaden the eligibility of hydropower. Rhode Island is similarly considering adding large-scale hydro to the “renewables” mix. Massachusetts recognizes hydroelectric


49 Id. The power plant at Kendall Square in Cambridge, which sells its steam heat to surrounding commercial buildings in Cambridge and across the Charles River in Boston, is an example of such a facility. Boston-Cambridge, MA, VEOLIA ENERGY (2008), http://www.veoliaenergyna.com/veolia-energy-north-america/locations/boston-cambridge.htm.

50 Davies, supra note Error! Bookmark not defined., at 1376.

51 Current RPS Data, Archives by Year, DSIRE (Mar. 2013), http://www.dsireusa.org/rpsdata/index.cfm (follow link to Excel spreadsheet with various regulatory changes made state-by-state).

52 CONN. GEN. STAT. ANN. § 16-245a(h).


54 Jon Black, Presentation: Update on New Renewable Resources in the Queue, ISO-NEW ENGLAND (May 22, 2013), http://www.iso-
and biomass, but is increasingly tightening regulations to limit eligibility from these sources.  

B. Transmission and REC Systems

In the New England region, RECs are created from both local and imported renewable energy and tracked through the New England Power Pool (NE-POOL) Generation Information System (GIS). NE-POOL GIS does not administer trading, but rather acts as a passive registry for REC trading between market participants. To create valid RECs, a generator must receive approval from a state agency. NE-POOL further requires out-of-state generators have a “firm connection” to the New England power grid to sell RECs in the region.

Each state’s RPS has some provision that recognizes each New England state shares a literal and figurative connection to one another through ISO-New England.


57 225 MASS. CODE REGS. 14.05(8)(e).

58 Id.


60 Id.

59 This is known as a Statement of Qualification in Massachusetts. RPS and APS Program Summaries, MA DEP’T OF ENERGY RESOURCES (2013), http://www.mass.gov/eea/energy-utilities-clean-tech/renewable-energy/rps-aps/rps-and-aps-program-summaries.html (“[B]efore a REC can be created on NEPOOL GIS, a generator must first apply to DOER and receive a Statement of Qualification to sell RECs.”).

60 Ferrey, Threading the Needle, supra note 11, at 101.
Rhode Island, 61 Massachusetts,62 Connecticut,63 and New Hampshire64 recognize renewable energy originating from outside of ISO-New England’s NE-POOL, but only to the extent the energy underlying the REC is actually delivered to New England customers and meets certain other conditions.65 Maine requires a generator have the capability to deliver into NE-POOL “or to the Maritimes Control Area.”66

C. Timeline and Target Percentage Goals

Massachusetts, 67 Connecticut68, and New Hampshire69 have class tiers that distinguish between new sources, old sources, and source types. All of the following percentages, unless otherwise indicated, are RPS percentages required by 2020.

- Massachusetts divides percentages between Class I new sources (8% in 2013, scaling up to 15% by 2020 and increasing 1% each year thereafter) and Class II existing sources (a stable 3.6% renewable),70 as well as a separate “carve out” for solar, which has a credit multiplier that cushions

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61 R.I. GEN. LAWS ANN. § 39-26-5(c).
62 225 MASS. CODE REGS. 14.05 (5).
63 CONN. GEN. STAT. ANN. § 16-245a.
64 N.H. REV. STAT. ANN. § 362-F:6 IV. (a).
65 See supra notes 62-64.
67 225 MASS. CODE REGS. 14.07(1).
68 CONN. GEN. STAT. ANN. § 16-245a.
69 N.H. REV. STAT. ANN. § 362-F:3.
70 225 MASS. CODE REGS. 15.06 (1).
solar energy’s higher cost.\textsuperscript{71}

- Connecticut has Class I new sources (20%), Class II existing (3%), and Class III cogeneration and efficiency (4%).

- New Hampshire separates renewables into Class I new (11%), Class II solar (0.3%), Class III existing biomass (6.5%), and Class IV existing small hydropower (1%).\textsuperscript{72}

- Rhode Island has new (14%) and existing (2%) requirements,\textsuperscript{73} which will remain at 16% from 2019 on, unless legislators conclude the standard is no longer needed to encourage renewable energy objectives.\textsuperscript{74}

- Maine has a 30% requirement, but this must be unpacked. It includes existing hydroelectric and biomass facilities and was thus was already met when it first passed.\textsuperscript{75} The new source requirements are far more modest—6% in 2013, to increase incrementally to 10% by 2017.\textsuperscript{76}


\textsuperscript{73} Id.

\textsuperscript{74} R.I. GEN. LAWS ANN. § 39-26-5(c).

\textsuperscript{75} Fershee, Renewable Mandates and Goals, supra note Error! Bookmark not defined., at 81.

\textsuperscript{76} ME. REV. STAT. tit. 35-A, § 3210, 3-A (A.)(10).
Vermont’s RPS is merely a goal of 20% by 2017.\textsuperscript{77} The Vermont Senate considered but did not pass a mandatory RPS in 2012.\textsuperscript{78}

Several states have built contingency options into the standard. Rhode Island was at 4.5% as of 2010, to increase 1% from 2011-2014, and 1.5% from 2016-2019, provided there are adequate or potentially adequate “renewable energy supplies to meet these percentage requirements.”\textsuperscript{79} Maine has a similar provision that allows regulators to suspend scheduled RPS percentage increases if there is insufficient “investment in new renewable capacity resources.”\textsuperscript{80} These escape hatches have the potential to undermine the RPS model to pressure renewable development.

Each New England state has thus taken a somewhat different approach to how and when to reach RPS goals. This poses the greatest challenge to standardizing—acceptable compromises will be required to achieve the benefits of a consistent regional RPS in a manner fair and equitable to all participating states.

**D. Renewable Trust Fund**

All New England states administer a system benefit charge on electricity customers’ bills, the proceeds of which go into a trust fund.\textsuperscript{81} While individual

\begin{itemize}
\item \textsuperscript{77} Vermont’s Transition to Renewable Energy, VERMONTSPEED, \url{http://vermontspeed.com/} (lasted visited Nov. 11, 2013).
\item \textsuperscript{78} Alan Panebaker, Final Energy Bill Passes, Minus Renewable Portfolio Standard, \url{VTDIGGER.ORG} (May 4, 2012), \url{http://vtdigger.org/2012/05/04/final-energy-bill-passes-minus-renewable-portfolio-standard/}.
\item \textsuperscript{79} R.I. GEN. LAWS ANN. § 39-26-4(3)-(4).
\item \textsuperscript{80} ME. REV. STAT. tit. 35-A, § 3210, 3-A (B.) (1).
\item \textsuperscript{81} ELIZABETH DORIS ET AL., STATE OF THE STATES 2009: RENEWABLE ENERGY DEVELOPMENT AND THE ROLE OF POLICY 65-66 (2009), \url{http://www.nrel.gov/docs/fy10osti/46667.pdf}.
\end{itemize}
contributions are nominal (anywhere from cents to a few dollars per year), the charges generate millions.\textsuperscript{82} States use the funds for subsidizing renewables, energy efficiency programs, or both.\textsuperscript{83}

In sum, the basic RPS design, REC trading system, and renewable/efficiency subsidy programs across New England together demonstrate that the states share common methods and ideas. The prospect of harmonizing is not a radical proposition. Significantly, however, they depart on eligible renewables and timelines. Finding common ground on these matters requires an assessment of RPS performance in the New England states thus far, dominant and emerging renewable resources, and how the region will address transmission and capacity concerns going forward.\textsuperscript{84}

\textsuperscript{82} Ferrey, \textit{Threading the Needle}, supra note 11.


\textsuperscript{84} See infra Parts Error! Reference source not found. and Error! Reference source not found..