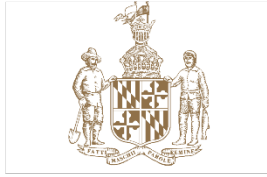


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May 13, 2021

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 561, "Renewable Energy Portfolio Standard - Wastewater Heating or Cooling System"

Dear Governor Hogan:

We have reviewed House Bill 561, "Renewable Energy Portfolio Standard - Wastewater Heating or Cooling System," for constitutionality and legal sufficiency. While we approve the bills, we note that there is a risk that if challenged, a court may find that a severable provision violates the Commerce Clause of the United States Constitution.

House Bill 561 makes energy from raw or treated wastewater that is used as a heat sink for a heating or cooling system eligible as a Tier 1 renewable source under Maryland's renewable energy portfolio standard program ("RPS") if it (1) is connected with the electric distribution grid serving Maryland, and (2) processes wastewater from Maryland residents.

Under Maryland's RPS, energy suppliers are required to accumulate renewable energy credits ("RECs" or "credits") based on their retail electricity sales in the State. Public Utilities Article ("PU"), § 7-703. Each credit represents 1 megawatt-hour of electricity from a qualifying Tier 1 or Tier 2 source, as defined in statute. PU § 7-701(n). Subject to certain exclusions, a supplier must accumulate and submit an amount of credits that represents a certain percentage of the supplier's annual in-state sales. PU § 7-703(d). Suppliers accumulate RECs by generating electricity from a Tier 1 or Tier 2 renewable source or by purchasing or otherwise acquiring RECs from Tier 1 or Tier 2 sources or suppliers. To be eligible to meet the Maryland RPS standard, Tier 1 and Tier 2 renewable

sources must be located (1) in the PJM region;¹ (2) in a control area adjacent to the PJM region if the electricity is delivered into the PJM region; or (3) on the outer continental shelf of the Atlantic Ocean in an area designated for offshore wind energy facilities. PU § 7-701(n). The geographic limitation for RPS eligibility has been further narrowed for certain Tier 1 renewable sources – specifically, for solar, geothermal, poultry litter to energy, waste-to-energy, and refuse derived fuel, all of which must be “connected with the electric distribution grid serving Maryland” to be eligible for inclusion in meeting the RPS standard. PU § 7-704.

As we noted in our bill review letter on House Bill 1186 and Senate Bill 652 of 2012:

Distribution grids are not necessarily interstate systems, but are usually thought of as a small voltage component of the electric grid (a portion of the electric grid serving a discrete area such as a residential neighborhood or commercial area) as opposed to a transmission system which usually serves to transfer larger voltages between the point of generation and interim substations. The intent of the “connected with the electric distribution grid serving Maryland” language appears to be to give favorable treatment only if the facility is located in Maryland or possibly adjacent to Maryland because of the requirement that it be connected to the distribution system serving Maryland. It is possible that some out-of-state sources may be connected to the distribution grid serving Maryland but, as a practical matter, they must be located fairly close to the borders of the State.

Similar to House Bill 561, that 2012 legislation made geothermal heating and cooling systems eligible for inclusion in the RPS if connected with the electric grid serving Maryland. Like geothermal heating and cooling systems, a wastewater heating or cooling system does not generate electricity.² Thus, the requirement that a wastewater system be

¹ PJM Interconnection, L.L.C. is a regional transmission organization that coordinates the movement of electricity “through all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.” (<https://www.pjm.com/about-pjm/who-we-are/territory-served>).

² House Bill 561 provides that a person shall receive a REC equal to the amount of energy, converted from British thermal units to kilowatt-hours, that is generated by a wastewater heating and

“connected to” the electric distribution grid serving Maryland, and the further requirement that it process wastewater from Maryland residents, simply serves to limit the geographic origin of wastewater system RECs that are eligible for inclusion in Maryland’s RPS.

The bill review letter on House Bill 1186 and Senate Bill 652 of 2012 noted that the provision requiring a geothermal heating or cooling system to be connected to the electric distribution grid serving Maryland may violate the Commerce Clause, but it concluded that the provision could be severed from the remainder of the bill if a court were to find it unconstitutional. We reached the same conclusion in our bill review letter on Senate Bill 690 of 2011, which made energy from waste-to-energy and refuse-derived fuel eligible for the RPS if the source is connected with the electric distribution grid serving Maryland.³

We are not aware of any reported cases that have specifically ruled on the constitutionality of in-state requirements or limitations in the context of renewable portfolio standards, though commentators have generally agreed that laws excluding out-of-state renewable energy sources violate the Commerce Clause.⁴ The Seventh Circuit, in *Illinois Commerce Comm. v. FERC*, 721 F.3d 776 (7th Cir 2013), suggested in dicta that Michigan’s Clean, Renewable, and Efficient Energy Act of 2008, which precludes the use of out-of-state sources to meet the state’s renewable energy requirements, violates the Commerce Clause by discriminating against out-of-state commerce.⁵ And though the

cooling system for space heating or cooling, industrial heating or cooling, or another useful thermal purpose.

³ The bill review letter on Senate Bill 595 and House Bill 1016 of 2007 found that this limitation as applied to solar energy did not violate the Commerce Clause, noting that “virtually all solar power is produced by customer-generators who install solar generating systems for their own energy needs and sell the excess to their own electric company,” and that “technical barriers exist to importation of solar energy from out-of-state.”

⁴ See, e.g., Carolyn Elefant and Edward A. Holt, *The Commerce Clause and Implications for State Renewable Portfolio Standards Programs*, Webinar Presented for Clean Energy Alliance (March 29, 2011), Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, and Possible Federal Legislation*, 45 Harv. J. on Legis. 259, 271 (Winter 2008).

⁵ The case addressed the legality of a transmission rate design to recover the costs of transmission lines built to transmit electricity from remote wind farms, which allocated the costs among utilities throughout the Midwest based on each utility’s share of electricity consumption. Michigan’s utility regulator and the state’s utilities argued the rate design would result in Michigan utilities paying a share of the costs that is disproportionate to the benefits derived from the transmission lines because Michigan law prohibits the use of out-of-state renewable energy to satisfy the state’s renewable energy requirements. Though the court did not explicitly hold that Michigan’s in-state requirement violated the Commerce Clause, it rejected the argument put forth by the state’s utilities and utility regulator because, in its words, “Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.” *Illinois Commerce Comm.*, 721 F.3d at 776 (citations omitted).

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Second Circuit, in *Allco Fin. Ltd. v. Klee*, 861 F.3d 83 (2d Cir. 2017), upheld Connecticut's renewable portfolio standard program in the face of a Commerce Clause challenge, Connecticut's program did not impose an in-state requirement.⁶

Finally, we note that the bill's geographic limitations may not raise the usual concerns under the Commerce Clause because of the atypical features of RECs derived from wastewater heating and cooling systems. First, because wastewater RECs are not derived from the generation of electricity, a wastewater REC does not represent the clean energy attributes of electricity sold in interstate commerce. Second, the lack of an interstate market for wastewater RECs may make the limitations less susceptible to a Commerce Clause challenge.

Nonetheless, in the event a court were to find that the bill's limitations for wastewater facilities – that they must be connected with the electric distribution grid serving Maryland and process wastewater from Maryland residents – are unconstitutional, it is our view that provision likely would be severable. Maryland law expressly provides for severability. General Provisions Article, § 1-210. Moreover, where a provision of a bill is found to be unconstitutional, it is generally presumed, “even in the absence of an express clause or declaration, that a legislative body generally intends its enactment to be severed if possible.” *Davis v. State*, 294 Md. 730, 383 (1982). It is clear that the purpose of the bill can be accomplished without the limiting language. As a result, it is our view the limitation, if found to be unconstitutional, would be severable from the remainder of the bill.

Sincerely,



Brian E. Frosh
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber

⁶ Under Connecticut's program, limited renewable sources must be in the New England ISO (the regional transmission area) or in adjacent control areas but did not impose an in-state requirement.