

State of Michigan
The Michigan Public Service Commission
Consumers Energy Company
Case No. U-17321

In a case decided June 7, 2013 in the United States Court of Appeals for the Seventh Circuit, Illinois Commerce Commission, et.al., (Petitioners), v. Federal Energy Regulatory Commission, (Respondent), Judge Richard Posner found Michigan's Comp. Law 460.1029 forbids Michigan utilities to count renewable energy generated outside the state towards satisfying the requirement in the "Clean, Renewable, and Efficient Energy Act 295 of 2008" to provide to Michigan residents and businesses electricity that is produced from renewable sources. The amount of electricity produced from renewable sources must be 10% or greater by 2015.

In this case the state of Michigan admitted "its law forbids it to credit wind power from out-of-state against a state's required use of renewable energy to its utilities". Judge Posner opined in dicta that the Michigan argument "trips over an insurmountable constitutional objection". He said, "Michigan cannot, without violating the Commerce Clause of Article 1 of the Constitution, discriminate against out-of-state renewable energy." The court cited three Supreme Court cases in support of his comments. (Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994); Wyoming v. Oklahoma, 502 U.S., 437 (1992) and Alliance for Clean Coal v. Miller, 44 Fd3d 591 (7th Cir. 1995)).

Legal scholars at Suffolk University Law School and others have opined that Michigan Law 460.1039, Section (2) and other similar state laws violate the interstate commerce clause. The law discriminates against the use of equipment manufactured out-of-state or a workforce composed of out-of-state residents used in the construction of a renewable energy system in Michigan. The law only grants bonus Renewable Energy Credits to renewable energy facilities constructed in Michigan that use materials made in Michigan or a workforce composed of Michigan residents.

The questions presented by these facts are:

Does Michigan's Clean, Renewable, and Efficient Energy Act 295 of 2008, violate Article 1, Sec. 8, Clause 3 of the United States Constitution, that grants Congress the power to regulate "Commerce Among the Several States" because the Act:

- a. Discriminates against nonrenewable energy produced instate and in other states by eliminating nonrenewable energy sources from 10% of the available energy market in Michigan without justifiable cause, and
- b. Discriminates against out-of-state resources (equipment and labor) used in the construction of renewable energy systems by granting bonus renewable energy credits to renewable energy facilities constructed in Michigan provided said facilities only use materials manufactured in Michigan or a workforce composed of Michigan residents without justifiable cause, and

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- c. Discriminates against out-of-state production of renewable energy by denying Michigan utilities the right to count renewable energy generated out-of-state towards meeting the requirements of the law to obtain at least 10 percent of their electrical power needs from renewable sources by 2015 without justifiable cause, and lastly
- d. Does the discrimination alleged in paragraphs (a), (b), and (c) advance a legitimate state interest under the Supreme Court's "strict scrutiny test" used by the court when it analyzes 'per se' violations of the Interstate Commerce Clause.

Clearly, the law as written are 'per se' violations of the Commerce Clause and the cumulative effects of the discrimination creates an unreasonable restraint on interstate competition and commerce in both the nonrenewable and renewable energy markets.

In addition if we consider the renewable energy market as a distinct and separate submarket, comprising energy produced from wind, solar, biomass or hydroelectric, wind clearly has 97% or greater of the market share for renewable energy in Michigan. This market share and the limited number of renewable energy systems participating in this market presents a prima facie case that the law authorizes and facilitates conduct that constitutes a violation of the United States Antitrust Laws (*Sherman Act, 15 U.S. Code, Section 1*). The Supreme Court has ruled a state statute should be struck down on preemption grounds if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws, or if it places irresistible pressure on a private party (electric cooperatives) to violate the antitrust laws to comply with the statute *Fisher v. City of Berkeley, 475 U.S. 260*.

The Renewable Energy Mandate facilitates the concentration of economic power in the production of renewable energy in Michigan to a few participants.

The United States Department of Energy's Renewable Energy Laboratory (NREL) has determined that Michigan's wind potential is marginal. They found only 24% of Michigan's land mass has enough wind capacity suitable for wind farm development (wind speeds of 6.5 meters/sec.{14 m.p.h} at heights greater than 80 meters {262 feet}. In their study available land mass excluded protected lands (national and state parks) and incompatible land use (airports). However, it did not consider the unavailability of land that would be excluded because of local zoning regulations. Consequently, Michigan's available land mass for wind turbine development is less than the 24% availability cited in NREL's study.

This further reduces competition and thereby concentrates economic power in the renewable energy market in those few utilities who have the financial resources to build wind turbines. This barrier combined with the Renewable Energy Mandate's closed border on the importation of renewable energy concentrates monopoly if not oligopoly

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power in a few utilities having the economic power to participate in the production of renewable energy. This concentration of economic power is detrimental to the consumer of electric power and is the harm the MPSC is to protect.

When the Court is required to use the “strict scrutiny” test to analyze “per se” violations of the Commerce Clause it requires the state to provide empirical evidence to justify the law and its discriminatory effect on interstate commerce. The state must prove the law, on balance, advances a legitimate and compelling state interest, and the law is the least intrusive means to achieve that interest.

The creation of an instate industry and instate jobs to manufacture and install wind turbines; to reduce greenhouse gases and carbon dioxide, or combat global warming or climate change all appear laudatory. However, the means to reach these goals cannot have a discriminatory and adverse effect on interstate commerce. The “consensus among scientists...” argument, or climate change data based on questionable computer simulations are not persuasive empirical evidence the court requires.

In prior cases environmental preservation did not overcome “per se” violations of the Commerce Clause. If the “consensus” argument and computer simulations were persuasive, the constitutional challenges to renewable energy statutes filed in New York, California, Massachusetts, Colorado and New Jersey based on Commerce Clause violations would have been disposed of on summary judgement.

It is respectfully requested that the Administrative Judge defer any and all present and future rulings pertaining to rate increases or the construction of facilities for the construction of wind turbines until such time as the Office of the Attorney General can rendered an opinion on the constitutional validity of Michigan’s Clean, Renewable, and Efficient Energy Act 295 of 2008. The Attorney General should also investigate whether the concentration of economic power in the renewable energy market has in fact violated the Federal Antitrust laws.

The attached Memorandum expands on the issues presented in this oral presentation.

Respectfully yours,

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***About the Author:** The author is a retired attorney with degrees in law and science. The author has a Bachelor of Science in Pharmacy from Drake University in Des Moines, Iowa, and a Juris Doctorate in Law from John Marshall Law School in Chicago, Illinois.

The author was employed by Broadlawns Polk County Hospital in Des Moines, Iowa; Eli Lilly and Company, Indianapolis, Indiana; Northwestern University Medical School, Chicago, Illinois, and The Dow Chemical Company, Midland, Michigan before retirement.

The author has been actively engaged in the following areas of the Law during his 30-year legal career with The Dow Chemical Company.

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The author served as General Counsel for Dow Chemical Latin America and was part of Dow's corporate legal management and supervisory team before retirement.