In an important victory for the Federal Energy Regulatory Commission (FERC) — and in my view for renewable energy more generally — the U.S. Court of Appeals for the 7th Circuit has upheld a FERC order that helps finance transmission lines to carry renewable energy from rural areas to urban centers in the midwest and mid-Atlantic regions. One of the biggest obstacles to the growth of renewable energy is transmitting the energy (especially wind) from the generating regions of the country to the consuming regions. The new case validates innovative methods to finance such transmission.

The opinion, *Illinois Commerce Commission v. FERC*, is important for another reason. The 7th Circuit also raised serious questions about whether Michigan's Renewable Portfolio Standard (RPS) that gives utilities credit toward meeting their renewable energy goals only for renewable power generated in-state. is constitutional under the Commerce Clause. The Commerce Clause portion of the opinion may provide ammunition against other RPSs that favor in-state renewable power generation.

The issues in *Illinois Commerce Commission v. FERC* are exceptionally complex. Nevertheless, the 7th Circuit's opinion, authored by Judge Richard Posner, is about as clear an explication of the issues as is possible. The basic issue in the case is relatively straightforward: can utilities that are part of regional organizations that share transmission lines be forced to pay for new high voltage lines to transmit renewable power throughout the covered region? The regional organizations involved in the case are known as the Midwestern Independent System Operator ("MISO") and PJM Interconnection (PJM stands for Pennsylvania, Jersey, Maryland Power Pool). MISO covers the below region:

PJM Interconnection covers the area depicted in this map:

MISO and PJM coordinate the transmission of electricity across their regions and are also responsible for maintaining, expanding and upgrading their transmission grids. In order to finance such transmission projects, the regional organizations have authority to levy fees against their members (utilities) so long as those fees are just and reasonable under the Federal Power Act. The opinion focuses heavily on MISO's request for approval by FERC of cost allocation for the building of transmission lines that would carry wind power generated in the Great Plains states, with low population, cheap land and an abundance of wind resources, to urban centers like Detroit, Chicago and surrounding suburbs. If the wind energy can be transmitted, even factoring in transmission costs, the power generated will be cheaper than many existing energy sources in the MISO service area. The wind power will also improve the reliability of the system by generating additional electricity.

MISO sought FERC approval to finance two pilot projects to build high voltage lines for wind power. Its financing mechanism is what drew the legal challenge: rather than financing transmission by charging utilities based on proximity to the new lines, MISO instead allocated costs to utilities within MISO based on "their share of the region's total wholesale consumption of electricity. " The effect of this cost allocation will be to charge urban areas, the likely consumers of the new wind power, more than rural areas that are actually the providers of the wind power.

Several states and utilities challenged the cost allocation on six separate grounds. The court rejected each of the arguments, including a constitutional challenge that the cost allocation method violated the 10th Amendment by unconstitutionally commandeering states to participate in the scheme. Judge Posner called that argument "frivolous."

The court also rejected an argument that the cost allocation would violate the Federal Power Act by unjustly requiring utilities to bear costs disproportionate to the benefits they would receive; the challengers also argued that the overall costs of the projects exceed the benefits in violation of the FPA.

The state of Michigan had a somewhat unique argument, one that led to the declaration that the Michigan RPS is likely unconstitutional. Michigan argued that because its RPS only allows its utilities to use in-state renewable generation to meet its 10 percent RPS, its utilities would not utilize wind power from other states and hence shouldn't be required to pay for the transmission necessary to deliver that power. Judge Posner rejected that argument, saying that it

> trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.

The language about the Commerce Clause is technically not a holding – the Michigan RPS was not challenged in the case but was instead used as part of Michigan's legal argument against the FERC pricing order. But it's still important language.

Overall, the opinion is a resounding victory for FERC, whose outgoing Chairman has worked hard to expand the generation and transmission of renewable energy.

The case also creates new legal doubts about the constitutional validity of a number of states' renewable portfolio standards. California's RPS, for example, provides favorable treatment to renewable energy projects that connect directly to the state's grid or that meet complex procedures for moving the energy onto the state's grid. Though out of state renewable energy providers are upset about these requirements and have raised constitutional concerns, the fact that the RPS does not facially discriminate against out of state sources may make the California program somewhat less susceptible to constitutional challenge. A number of other states have RPSs that may be constitutionally vulnerable, including Arizona, Colorado, Delaware, Maine, Missouri, Nevada, North Carolina, Ohio and Washington. Steve Ferrey has a very helpful article outlining the parameters of the programs and their legal vulnerability here.

Though the 7th Circuit opinion may raise constitutional concerns about a number of state RPSs, the statutes can relatively easily be amended to remove the discrimination in favor of in-state generation. In my view this makes the court's opinion far less troubling than the Commerce Clause challenge to California's Low Carbon Fuel Standard (for a description of the case see here). The RPS programs that discriminate in favor of in-state generation are intentionally protectionist. The commerce clause is aimed at preventing states from engaging in protectionist regulation by favoring in-state business. By contrast, the LCSF is designed to try to estimate the carbon footprint of various fuels that are supposed to be lower carbon content and uses geographic location in an attempt to measure that footprint. The motivation is to estimate carbon emissions accurately, not to favor in state fuel manufacturers. If California loses the LCFS case the state will have difficulty crafting new regulations that accurately capture a fuel's carbon content. If the state's RPS were struck down, the state could craft new rules that treat in and out of state sources of renewable energy equally.

Overall, then, the bottom line result of *Illinois Commerce Commission v. FERC* is good news for renewable energy. While states may have to revamp their RPSs to meet constitutional requirements, the case makes the transmission of renewable energy more likely. That's a big deal.