An important Second Circuit ruling in June should help clarify some of the lingering legal issues about state efforts to expand renewable energy. Judge Calabresi's opinion in *Allco Finance v. Dykes* rejected claims that Connecticut's policies interfered with interstate commerce and invaded an area of exclusive federal regulation. This will be a useful precedent for defending other state programs.

Both the Connecticut policies and the applicable legal doctrines are complicated, but I'll try to avoid getting too deep in the weeds. Connecticut, like many other states, has a renewable portfolio standards (RPS), meaning that utilities in the state must obtain a certain percentage of their power from renewable sources. Utilities can satisfy this requirement either by generating renewable electricity themselves or by buying renewable energy certificates, which certify that a megawatt of renewable energy was fed into the grid. The state limits these certificates to the area of the grid within the same transmission zone or the larger zone of sources that sell electricity into that region. Thus, a certificate generated in a more remote portion of the country could not be used by a Connecticut utility to meet its renewables quota.

The first issue in the case was whether the Connecticut had interfered with interstate commerce. Under a doctrine lawyers call the dormant commerce clause, a state law is invalid if it discriminates against interstate commerce or if it places an undue burden on interstate commerce.

It was this regional limitation that Allco attacked. Because the program distinguishes between renewable energy credits based on their place of origin, Allco argued that it discriminated against areas outside of the region. The court rejected that argument because it saw legitimate regulatory reasons to consider credits produced in the area different from those produced outside. Among other things, encouraging the use of renewables in its own region reduced air pollution that could affect the state. It also provided Connecticut consumers with a more diversified and renewable energy supply. The court also noted that the region was not defined by the state fiat but by grid operation authorities established under FERC's authority. By the same token, the court also concluded that the burden created by the regional limit on renewable credits was clearly outweighed by the benefits.

The other, more complicated issue in the case was whether another part of the state law invaded an area of exclusive federal jurisdiction under the Federal Power Act (FPA). Under the FPA, the federal government has exclusive jurisdiction over wholesale transactions and the interstate grid, whereas the states have exclusive jurisdiction over retail transactions by utilities to consumers. (There's one significant exception: a 1978 statute does authorize states to mandate utility purchases of electricity from small renewable sources, under 80 megawatts, but the exception wasn't involved in this litigation.) The issue was whether, in pushing utilities to purchase renewable energy, the state had trespassed on federal jurisdiction over wholesale transactions.

This area of law is not easy to understand because the lines between interstate and local, and between wholesale and retail markets, have become extremely blurry. Unless you live in parts of Texas, your local electricity grid is connected to the interstate grid. And local electricity markets are linked through the interstate wholesale market, so any regulation at one level has an impact on the other level. Still, courts have to somehow draw a line somewhere.

Allco challenged a scheme for designating renewable generators to enter into long-term contracts with Connecticut utilities. One issue is whether the statute forced utilities to enter into such contracts; the court interpreted the provision only to require that utilities negotiate in good faith with the generators. The more important question was whether the Connecticut program was invalid under a recent Supreme Court case, *Hughes v. Talen Energy*, which invalidated a Maryland renewable energy program. The court gave *Hughes* a narrow reading and found it distinguishable. The Maryland program, in contrast to Connecticut's, was directly tied to an electricity auction market established by FERC. In contrast, the Connecticut program involved bilateral contracts that are typically regulated by states and are controlled by FERC only through after-the-fact determinations of the reasonableness of the price. Thus, the Court limited *Hughes* to cases in which the state was deliberately changing the prices set in the auction market, as it had in *Hughes.*

The court also found that the indirect effect of the Connecticut program on interstate wholesale prices was not a basis for attacking the ordinance. Such indirect effects clearly cannot be enough to preempt a state utility regulation, because every time a state regulates its own electrical utilities there are bound to ripple effects in the interstate market.

If nothing else, I hope I've convinced you that this is a complicated area of the law. For that reason, any single case only moves the ball to a limited extent. But the Second Circuit deserves credit for giving the ball a good kick in the right direction.