Thanks to Ann Carlson for pointing out the significant decision recently issued by 7th Circuit Court of Appeals related to allocating the cost for new electric transmission lines and for so concisely describing its complicated fact pattern. But I have to respectfully disagree with Ann’s suggestion that this decision has cast any meaningful doubt on the constitutionality of Michigan’s renewable portfolio standard .

Judge Posner’s throw-away comment about the Commerce Clause was not based on a close examination of Michigan’s law. As Ann points out, the Michigan law was not even challenged in the case. Had he looked at the law, Posner would have discovered that it does not contain a blanket restriction on out-of-state renewables. Out-of-state renewables qualify for the program if they are within the service territory of a utility that also serves Michigan. Any meaningful review of the constitutionality of this provision would have to include consideration of the purpose for ensuring that the renewable power would be close at-hand.

There are valid reasons for looking at the physical relationship of the renewable power to the state’s grid – this is not all about protectionism. If the utility purchasing the renewable output cannot take delivery of that power for the benefit of its customers, it will have to acquire additional power that can be delivered. Logically, that other power will not be renewable, since otherwise, it would be used to comply with the clean energy standard. In Michigan, that other power may very well come from a coal-fired generating facility. It is true that the undelivered power may displace some form of generation in its state of origin, but it would be impractical to keep track of its effects in all instances. Suppose that the neighboring state burns natural gas on the margin. In that circumstance, the renewable power might displace natural gas, rather than coal, and the net reduction in greenhouse gas emissions would be cut in half. In addition, rather than reducing local air emissions, water pollution and water use from the coal plant in Michigan, the renewables would reduce local emissions in another state. Michigan has a legitimate interest in reducing its local pollution. Maybe the effects of relying on undelivered power in a given instance might be different. The point is that as one moves further away from the utilities and their service territories, the net effects become less certain. In addition, there are other legitimate local interests, such as fuel diversity and system reliability.

Further, Posner’s throw-away assumption about constitutionality might make his decision reversible. Regardless of how he feels about the Michigan law, it is still in effect. By dwelling on his unstudied opinion about constitutionality, he has failed to

resolve Michigan’s initial argument. The question before the court went to the impact that the law might have on the appropriate allocation of transmission line costs. Posner never addressed that.

Under all of these circumstances, it is hard to imagine that Posner’s statement will have much of an impact on the viability of various states’ renewable energy laws.