

Review of Legal Issues Related to Proposed Stop-leakage Mechanisms

Workshop on Imports and Emissions Leakage
In Support of the Regional Greenhouse Gas Initiative

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Overview

- Describe principles underlying Dormant Commerce Clause jurisprudence
- Implications for design of stop-leakage mechanisms
- Implications for how such mechanisms are framed to withstand constitutional challenges

Dormant Commerce Clause Framework

- Balance state's legitimate interest in protecting the environment against burdens imposed on interstate commerce
 - Purpose: Economic protectionism or evenhanded restriction?
 - Means: "Discrimination" means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter
 - See, e.g., *City of Philadelphia v. New Jersey*
 - Facial discrimination virtually *per se* invalid
 - Important exceptions that may apply to some stop leakage mechanisms
 - Effects: Courts much more tolerant of facially neutral restrictions even where there is an "incidental" burden on interstate commerce
 - See, e.g., *Minnesota v. Clover Leaf Creamery*

Optimizing Chances of Survival

- Do not betray a discriminatory purpose (e.g., protect capped generators' market share) in justifying restrictions
- Safest to avoid stop-leakage mechanisms that, on their face, discriminate against kwh's based on the state of origin
- More latitude will be given to stop-leakage mechanisms that do not facially discriminate against, but may disparately impact, imported kwh's

Complementary Energy Policies: SBC

- Court has consistently stated that subsidies to in-state industry do not contravene Commerce Clause
- Exception to proscription against geographically-based discrimination
- SBC distinguishable from “tax and rebate” scheme struck down in *West Lynn Creamery*
- Record support
 - Furthers non-discriminatory state purpose
 - Well established state role in promoting energy conservation
 - Serves legitimate state interest in least cost energy service
 - Likely winners and losers not geographically dependent
 - Are out-of-state or multi-state entities eligible beneficiaries?

Counting but Not Capping Mechanisms: EPS

- High likelihood of being sustained as facially neutral environmental restriction
- True even if the result is a shift in output from non-capped (interstate) to capped (intrastate) sources
 - Commerce Clause protects interstate markets; not market share of interstate firms
- Supported by evidence of:
 - low carbon generators outside RGGI region benefited by program
 - high carbon generators in RGGI region harmed by program
 - existence of conforming generation in genco's overall portfolio able to serve RGGI market
- Avoid trap of “extraterritorial regulation”

Assigning Responsibility to LSE

- **Design is critical**

- Choice #1: Retrofitting model rule with parallel requirement that LSE's hold allowances for imports only
 - Would probably trigger strict scrutiny
 - Saved by compensatory tax doctrine?
- Choice #2: Requiring LSE to hold and retire allowances for all supply, whether imported or generated in-region
 - Mitigates risk of constitutional challenge
 - Residual concerns related to allowance allocation and method for assigning carbon responsibility to imports

- **Record support**

- Show no greater burden on out-of-state economic interests
- Show that this is a way to level playing field rather than confer advantage on in-state interests
- Show local environmental consequences absent mechanism
- Tie to core state function of regulating provision of electric service