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April 22, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 375 and Senate Bill 209

Dear Governor O'Malley:

We have reviewed House Bill 375 and Senate Bill 209, which are identical. These bills increase the standard for non-solar Tier 1 renewable resources and raise compliance fees for credit shortfalls beginning in 2011. The bills also allow the Public Service Commission to grant a delay if the total costs associated with meeting the renewable portfolio standards (RPS) are equal to or greater than 10 percent of the electric supplier's sales revenue in the State. In analyzing these bills, we considered whether the provisions violate the Commerce Clause of the United States Constitution. It is our view that they do not. Therefore, we hereby approve the constitutionality and legal sufficiency of both House Bill 375 and Senate Bill 209.

The RPS program was originally enacted in 2004. That program permits inclusion of energy for purpose of meeting the RPS if it is from a renewable source that is located in the "PJM region" or in a state that is adjacent to the region, or outside that area, but in a "control area" that is adjacent to the PJM region if the electricity is delivered into the PJM region. A control area is part of an interconnected system with a common generation control system and may contain one or several utilities. PJM itself is a Regional Transmission Organization that was originally designated as such under Federal Energy Regulatory Commission (FERC) Order 2000, 65 FR 810-01 (2000). Since then it has expanded so that now it coordinates the movement of electricity in all or parts 14 of states including Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. Thus, the PJM region controls and manages the transmission of electricity over a broad geographical area and includes several states.

In our bill review letter on the 2004 legislation enacting RPS provisions, we noted that the provisions did not prevent suppliers from purchasing electricity, renewable or otherwise, from any source in the country, and treated sources in other states in Maryland's region the same as in-state resources. Thus, we concluded that the actual impact on interstate commerce from RPS would be, at most, incidental, and that it was justified by interests other than simple

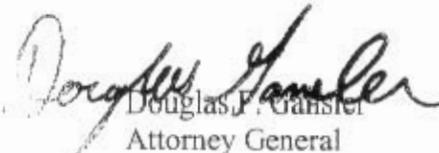
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protectionism. Therefore, we found that the legislation did not violate the Commerce Clause. *See* Att'y Gen. Bill Review Ltr. on House Bill 1308 and Senate Bill 869 (Regular Session 2004). For similar reasons, we also determined that legislation that increased the RPS and the amount that must come from solar energy did not violate the Commerce Clause. *See* Att'y Gen. Bill Review Ltr. on House Bill 595 and Senate Bill 1016 (Regular Session 2007).

House Bill 375 and Senate Bill 209 revise the geographical area that qualifies for the RPS credit and eliminate credit for electricity supplied by renewable resources from states adjacent to PJM. Nonetheless, the legislation continues to allow credit for renewable resources located in control areas adjacent to PJM to qualify if the electricity is delivered into PJM. As a practical matter, the revision in the geographical area is of marginal importance because states adjacent to PJM are in control areas "adjacent to PJM" and will count as qualifying resources if the electricity is delivered into PJM. Thus, the changes caused by these bills still do not cause us to believe that the RPS program violates the Commerce Clause.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of both House Bill 375 and Senate Bill 209.

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/SB/lk

cc: The Honorable Thomas V. Mike Miller, Jr.
The Honorable Michael E. Busch
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro