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May 13, 2011

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

Re: Senate Bill 690

Dear Governor O'Malley:

We have reviewed Senate Bill 690, "Renewable Energy Portfolio - Waste-to-Energy and Refuse-Derived Fuel" for constitutionality and legal sufficiency. While we approve the bill we note that a severable portion most likely violates the Commerce Clause of the United States Constitution.

Under Maryland's renewable energy portfolio standard, a certain percentage of electricity sold in the State must come from either tier 1 or tier 2 renewable sources. Compliance is based on renewable energy credits, which are gained through the use of electricity 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. Credits are earned by direct purchase of renewable energy for resale, or by the purchase of excess credits from suppliers who have more credits than they need. The bills also require the Public Service Commission to establish and maintain a market-based renewable energy trading system to facilitate the creation and transfer of the renewable energy credits.

Senate Bill 690 amends Maryland's renewable energy portfolio standard to move waste-to-energy from Tier 2 to Tier 1 and to add refuse-derived fuel to Tier 1. The portfolio standard currently requires that 5% of the energy sold in the State come from Tier 1 renewable sources, including at least 0.05% derived from solar energy, and that

2.5% of the energy sold in the State come from Tier 2 renewable sources. Over time, however, the amount that must come from Tier 1 renewable sources continues to increase, while use of Tier 2 renewable sources is not required after 2018. Amendments to the bill provide that energy from waste-to-energy and refuse-derived fuel is eligible for inclusion in meeting the renewable energy portfolio standard only if the source is connected with the electric distribution grid serving Maryland. As a result of this amendment, energy from waste-to-energy and refuse-derived fuel sources that are not connected to the Maryland grid does not qualify as either a Tier 1 or a Tier 2 source.

Under Maryland's renewable energy portfolio standard law, energy is eligible for inclusion in the renewable energy portfolio standard only if it comes from a source located in the PJM region or in a control area that is adjacent to the PJM region, if the electricity is delivered into the PJM region. Public Utilities Article § 7-701(i). The PJM region is the control area administered by the PJM Interconnection, Inc., and currently includes all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.[1] Some Tier 1 sources, such as solar, are subject to the further requirement that the source be "connected with the electric distribution grid serving Maryland." Public Utilities Article § 7-704(a)(2)(i)1. This language applies only to energy produced by a entity linked to an electric company in Maryland and sold to that company, and to renewable energy credits that reflect energy produced by such entities for their own use. Bill Review Letter on Senate Bill 595 and House Bill 1016 of 2007. Thus, it may include some sources that are outside the State, but, as a practical matter, they must be located fairly close to the borders of the State.[2] Senate Bill 690 extends this requirement to waste-to-energy and refuse-derived fuel.[3]

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[1] In the Bill Review Letter on House Bill 1308 and Senate Bill 869 of 2004, which adopted the renewable source portfolio standard, we concluded that while those bills on their face appeared to discriminate against some interstate commerce, the practical effect would be minimal because, "under the regional system developed by FERC, most of the electricity consumed in the State is generated within the PJM region, and very little is produced in states that are the farthest away."

[2] The debate on Senate Bill 690 reflects this understanding. Calendar Day April 11, Legislative Day April 6 at 4:16:56 p.m. and following.

[3] The Bill Review Letter on Senate Bill 595 and House Bill 1016 of 2007 found that this limitation did not violate the Commerce Clause as applied to solar energy, noting that "virtually all solar power is produced by customer-generators who install solar generating

The Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, provides that "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." Although it is stated as a grant of power to Congress, it has long been recognized that the Commerce Clause has a dormant aspect that "prohibits States from 'advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill v. Michigan*, 504 U.S. 353, 359 (1992). Thus, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. ... But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The sale of electrical power across state lines is commerce among the several states within the meaning of the Commerce Clause. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Supreme Court found that an Oklahoma law requiring coal-fired electric generating plants in the State to burn a mixture of coal containing at least 10% Oklahoma-mined coal violated the Commerce Clause. Noting that *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) had held that the "negative" aspect of the Commerce Clause prohibits economic protectionism, "that is, regulatory measures designed to benefit in-state economic interests by burdening our-of-state competitors," the Court found the 10% requirement discriminated against out-of-state commerce and was invalid. In doing so, the Court rejected arguments that the statute should be upheld because the burden on commerce was de minimis, stating that the "volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination of whether a State has discriminated against interstate commerce." *Id.* at 455. Because the act discriminated against interstate commerce, the Court applied the strictest scrutiny and found that the State had failed to meet its burden to "justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 456.

On its face, Senate Bill 690 does not explicitly forbid the use of out-of-state sources or require the use of in-state sources. The bill does not prohibit any electricity supplier from purchasing electricity, renewable or otherwise, from any state in the

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systems for their own energy needs and sell the excess to their own electric company," and that "technical barriers exist to importation of solar energy from out-of-state."

country. It does not prohibit the sale in Maryland of electricity from any other state in this State. Moreover, it is possible under Senate Bill 690 to meet the renewable energy portfolio standard using energy from out-of-state. A Commerce Clause issue is raised, however, because the bill draws a distinction between some energy generated inside the State and most energy generated anywhere else for purpose of qualification for inclusion in the renewable energy portfolio standard. In this way, Senate Bill 690 creates an incentive for the purchase of energy generated in or very near this State. Such "encouragement" of the use of in-state energy has been found to violate the Commerce Clause even where a law does not explicitly forbid the use of out-of-state sources or require the use of in-state sources. *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 560 (7th Cir. 1995) (economic incentives to use high-sulfur coal from in-state); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995) (favorable treatment of use of in-state coal and requirement that large suppliers install scrubbers to allow the continued use of in-state coal).

To date, there are no reported cases on in-state energy requirements or limitations in the context of renewable energy portfolio standards.[4] Commentators have generally agreed, however, that exclusion of out-of-state sources of renewable energy violate the Commerce Clause. Carolyn Elefant and Edward A. Holt, *The Commerce Clause and Implications for State Renewable Portfolio Standards Programs*, Webinar presented for Clean Energy States Alliance (March 29, 2011);[5] Nathan E. Endrud, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, The Supremacy Clause, and Possible Federal Legislation*, 45 Harv. J. On Legis. 259, 271 (Winter 2008); Patrick R. Jacobi, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 Vt. L. Rev. 1079, 1082, 1111 (2006); Nancy

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[4] TransCanada filed suit against Massachusetts officials based on limits in its law and related provisions in April of 2010. *TransCanada Marketing v. Bowles*, 4:2010cv40070 (filed April 16, 2010). A partial settlement was reached based on modifications to the challenged program, and the case has not moved forward. The American Tradition Institute sued the State of Colorado April 4, 2011. *See* www.americantraditioninstitute.org/wp-content/uploads/2011/04/ATI-RPS-Lawsuit-Amended-Complaint.pdf. (Last visited May 5, 2011). That suit asserts that Colorado's renewable energy program discriminates, not only against out-of-state producers of renewable energy, but also against producers of non-renewable energy, and that both forms of discrimination violate the Commerce Clause.

[5] *See* www.cleanenergystates.org/assets/Uploads/HoltElefantCommerce-Clause-110329.pdf (last visited May 5, 2011).

Rader and Scott Hempling, *Renewables Portfolio Standard: A Practical Guide*, prepared for the National Association of Regulatory Utility Commissioners, Appendix A (2001).

If a court finds that the limitation to sources connected to the Maryland grid is unconstitutional, our view is that that provision would most likely be found to be severable. Maryland law expressly provides for severability. Maryland Code, Art. 1, § 23. Moreover, where a provision of a bill is found to be unconstitutional, it is generally presumed, "even in the absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible." *Davis v. State*, 294 Md. 370, 383 (1982). Thus, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Id.* at 384. It is clear that the transfer of waste-to-energy from Tier 2 to Tier 1, and the addition of refuse-derived fuel to Tier 1 can be accomplished without the limiting language. Moreover, while the limit was added by a committee amendment, and discussed on the floor, there is no clear indication that the legislature would not have made the change without that limitation. As a result, it is our view that, if the limitation were to be found unconstitutional, it would be severable from the remainder of the bill.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Thomas M. Middleton
The Honorable John P. McDonough
Joseph Bryce
Karl Aro