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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 23, 2021

Representative Ken Helm
900 Court Street NE H490
Salem OR 97301

Re: Dormant Commerce Clause

Dear Representative Helm:

You asked whether the dormant Commerce Clause of the United States Constitution would allow for a state to require prioritizing renewable energy projects that produce direct energy resiliency benefits for Oregon or local regions. We believe it is more likely than not that such a requirement would withstand a dormant Commerce Clause challenge. Please note, however, that dormant Commerce Clause case law is complex and often fact intensive. For those reasons, our conclusion cannot be free from substantial doubt.

Dormant Commerce Clause Analysis

The Commerce Clause of the United States Constitution grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] Although the Commerce Clause grants authority to Congress, courts have long understood the Commerce Clause to also limit a state's authority to create laws that discriminate against or burden the flow of interstate commerce (i.e., the dormant Commerce Clause).[2] Dormant Commerce Clause jurisprudence "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[3]

Under United States Supreme Court case law, a law that "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect . . . is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means."[4] A law that is not discriminatory, but still imposes a burden on interstate commerce, will be upheld unless the burden is "clearly excessive in relation to the putative local benefits."[5] In addition, "a statute that has the practical effect of exerting extraterritorial control over commerce that takes place wholly outside of the State's borders is likely to be invalid."[6]

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[1] Article I, section 8, clause 3, United States Constitution.
[2] *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).
[3] *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 910 (9th Cir. 2018), *quoting Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008) (internal quotation marks omitted).
[4] *Rocky Mt. Farmers Union v. Corey* (*Rocky Mountain I*), 730 F.3d 1070, 1087 (9th Cir. 2013), *quoting Maine v. Taylor*, 477 U.S. 131, 138 (1986) (internal quotation marks omitted).
[5] *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).
[6] *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016), *quoting Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (internal quotation marks omitted).

We anticipate that a challenge under the dormant Commerce Clause to the direct energy resiliency benefits requirement could argue that the requirement is discriminatory (either on its face, or in its effect or purpose), has an invalid extraterritorial effect or fails the balancing test articulated in *Pike v. Bruce Church.*[7] We address each argument in turn.

Discrimination

A party challenging a provision requiring prioritizing renewable energy projects that produce direct energy resiliency benefits in this state might argue that the requirement discriminates against out-of-state operators of renewable energy projects because resiliency benefits must be achieved *in this state*, and a project's inability to achieve resiliency benefits in Oregon would place it at a competitive disadvantage. We believe it is more likely than not that such a challenge would fail.

The Ninth Circuit Court of Appeals has explained that "distinctions that benefit in-state producers cannot be based on state boundaries alone. But a regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally."[8] Accordingly, a law that treats in-state and out-of-state articles of commerce differently must be based on "some reason, apart from their origin, to treat them differently."[9]

We believe the key reason that a provision requiring prioritizing projects that produce energy resiliency benefits in this state likely does not discriminate against out-of-state commerce is that the requirement would prioritize renewable energy projects based on the resiliency benefits imparted by the underlying projects, not simply based on their place of origin. This is especially true if both in-state and out-of-state projects can meet the requirement. If out-of-state projects can meet the requirement and gain priority, the requirement is distinguishable from facially discriminatory laws that treat all articles of commerce originating in state one way and all articles of commerce originating out of state another way.[10]

Even if the requirement will be easier to meet for renewable energy projects located in Oregon, and some out-of-state projects will not be able to meet the requirement, a regulatory scheme that benefits some in-state businesses while burdening others does not necessarily run afoul of the Commerce Clause.[11] Again, it is the reason for the different treatment that matters, and different treatment based on something other than place of origin is permissible.

It is important to note that the proposed requirement for direct energy resiliency benefits does make reference to place—the benefits must have some impact in Oregon. We would expect any challenge to the requirement to center on this fact, and we acknowledge that a court might find this line of argument persuasive. However, we believe that tying the requirement to resiliency benefits achieved in Oregon is permissible because a state has broad authority to regulate utilities within its borders.[12] "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."[13] A regulatory scheme that distributes

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[7] 397 U.S. 137 (1970).
[8] *Rocky Mountain I*, 730 F.3d at 1089.
[9] *See Am. Fuel & Petrochemical Mfrs.*, 903 F.3d at 911, *quoting City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-627 (1978).
[10] *See, e.g., Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992) (striking down additional fee on all out-of-state hazardous waste disposed of at commercial site inside Alabama); *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (striking down similar fee on all out-of-state solid waste).
[11] *See Am. Fuel & Petrochemical Mfrs,* 903 F.3d at 916 ("The fact that some burdens of Oregon's program fall[] on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."), *quoting Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) (internal quotation marks omitted).
[12] *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 377 (1983).
[13] *Id.*

benefits and burdens based on local energy resiliency concerns is thus distinguishable from a regulatory scheme based on economic protectionism, which the Commerce Clause clearly prohibits.[14]

It is also important to note that if a court did conclude that the requirement to provide direct energy resiliency benefits in Oregon did amount to discrimination, the requirement would likely be struck down. Laws that discriminate against interstate commerce are subject to a "virtually *per se* rule of invalidity."[15] We think it is unlikely that Oregon could meet the high bar of showing that the requirement to provide direct energy resiliency benefits could not be served by nondiscriminatory means because Oregon could take any number of available nondiscriminatory steps to improve energy resilience.[16]

Extraterritoriality

The dormant Commerce Clause prohibits a state from regulating "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[17] There is a difference, however, between laws that directly regulate out-of-state parties and laws that regulate transactions or contractual relationships where at least one party is within the state.[18] As long as the requirement does not regulate commerce that takes place wholly outside of Oregon, it will not violate the dormant Commerce Clause on this basis. Even if the requirement causes out-of-state parties to change their behavior in order to meet the requirement, that result is not prohibited.[19]

***Pike* Balancing Test**

We anticipate that some, but not all, out-of-state renewable energy projects will not meet the energy resiliency benefits requirement and be at a competitive disadvantage in relation to projects that do meet the requirement, many of which will be located in state. However, the United States Supreme Court has explained that a nondiscriminatory law that causes a shift from out-of-state business to in-state business does not necessarily violate the Commerce Clause.[20] As noted above, courts will uphold a nondiscriminatory law that burdens out-of-state commerce unless the burden is "clearly excessive" in relation to the in-state benefits. We believe that the resiliency benefits requirement would withstand this balancing test because out-of-state renewable energy projects would not be excluded by the requirement, and Oregon has a strong interest in "protecting its citizens' health, safety, and reliable access to power."[21]

Application of Direct Resiliency Benefits Requirement to Region

You asked whether a requirement prioritizing renewable energy projects that benefit a region encompassing multiple states, such as the territory of the Bonneville Power Administration,

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[14] *See Rocky Mt. Farmers Union v. Corey* (*Rocky Mountain II)*, 913 F.3d 940, 957 (9th Cir. 2019) ("In both its design and its legislative justifications, [California's Low Carbon Fuel Standard (LCFS)] is a regulation aimed at salient environmental differences between different types of fuels, differences which genuinely reflect legitimate state interests. We reject the bald suggestion that the California LCFS is disguised economic protectionism.").
[15] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), *quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
[16] *See Chem. Waste Mgmt.,* 504 U.S. at 344-345 (discussing means available to Alabama to protect public and environmental health as alternatives to discriminatory fee charged on disposal of hazardous waste).
[17] *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015), *quoting Healy v. Beer Instit.*, 491 U.S. 324, 336 (1989).
[18] *See Rocky Mountain I*, 730 F.3d at 1103.
[19] *See id.* (states "are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants").
[20] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 474.
[21] *Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 106 (2d Cir. 2017).

would violate the dormant Commerce Clause. A regional preference can also violate the dormant Commerce Clause. "There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject."[22] The analysis of whether a regional resiliency benefit requirement violates the dormant Commerce Clause would be the same as the analysis for a state resiliency benefit requirement detailed above.[23]

Conclusion

For the above reasons, we believe that a challenge to a provision requiring prioritizing renewable energy projects that produce direct energy resiliency benefits in this state or in a region including this state would, more likely than not, survive a Commerce Clause challenge. At its core, the requirement appears to show a preference for projects that, in addition to reducing greenhouse gas emissions, provide some other benefit to Oregon. We do not believe that a regulatory system that distinguishes between projects based on their Oregon-based energy resiliency impacts runs afoul of the Commerce Clause, assuming these projects will be located both inside and outside of Oregon. We recognize that dormant Commerce Clause case law is very fact dependent. It is therefore difficult to predict how future regulatory developments or developments in the market might present facts that would lead to the resiliency benefits requirement being struck down.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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[22] *Ne. Bancorp v. Bd. of Governors of Fed. Res. Sys.*, 472 U.S. 159, 174 (1985).
[23] *Allco*, 861 F.3d at 103, n.16.