

Oregon's Coal Phaseout Could Spark Interstate Court Fight

By **Keith Goldberg**

Law360, New York (March 21, 2016, 5:54 PM ET) -- Oregon's recently enacted law phasing out the use of coal-fired power opens the door for legal challenges from nearby coal-producing states that say the law unconstitutionally regulates their own activities, and experts say a wave of such cross-border suits could be on the horizon if more states take action to unplug from coal.

The landmark law signed by Oregon Gov. Kate Brown earlier this month bars coal-fired generation from being a part of electricity sent to customers of the state's two major utilities, PacifiCorp unit Pacific Power and Portland General Electric starting in 2030, with a complete phaseout of coal-fired power by 2035. It also boost the state's renewable portfolio standard, or RPS — which directs the utilities to draw at least 25 percent of their power from renewable sources by 2025 — to 50 percent by 2040.

But experts say it could also lead to cross-border litigation similar to what's currently playing out in the Eighth Circuit, where Minnesota and coal-rich neighbor North Dakota are slugging it out over whether Minnesota's law barring new coal-fired plants from supplying electricity to the state imposes regulations on North Dakota in violation of the Constitution's dormant commerce clause.

"To the extent that states are Balkanized into ones that don't have coal-fired power and want to ban importation of coal-fired power, and others, you can imagine more [Minnesota-like] litigation," Arnold & Porter LLP environmental partner Jonathan Martel said.

To this point, most courts have rejected dormant commerce clause challenges to state laws designed to cut greenhouse gas emissions. In 2013, the Ninth Circuit upheld California's low carbon fuel standard requiring a 10 percent reduction by 2020 in the carbon intensity of transportation fuels, saying the program wasn't facially discriminatory and that the standard wasn't an impermissible extraterritorial regulation. The appeals court is currently hearing a challenge to Oregon's low-carbon fuel program after it was upheld by an Oregon district court in September.

Meanwhile, the Tenth Circuit in July rejected an argument that since Coloradans receive their energy from an interstate grid, the state's renewable energy standard — essentially an RPS — violates the dormant commerce clause because some out-of-state coal producers will lose business with utilities not in Colorado that feed into the grid.

But experts say the dormant commerce clause issue is far from settled, especially in instances like Oregon's law, which essentially outlaws coal-fired power in the state.

"The dormant commerce clause is very interesting but inchoate," Crowell & Moring LLP partner Richard Lehfelddt said. "The question is: Can the state put up a barrier at the state line and say, 'This resource is not going to flow into my state?'"

Not according to one Minnesota federal judge, who in April 2014 struck down that state's law that any new power sources that produce or supply 50 or more megawatts and increase carbon dioxide emissions, with limited exceptions, are barred from being added to Minnesota's energy mix, unless those emissions are offset by reductions elsewhere.

U.S. District Judge Susan Richard Nelson said that Minnesota's law directly regulated commerce within North Dakota, which constitutes an extraterritorial regulation in violation of the dormant commerce clause.

"Basically, what the district court said is that the generators can't control where the electricity is going to go when it's on a grid that doesn't respect state borders," Martel said. "Now you're forcing people in North Dakota who are making intrastate transactions to comply with Minnesota requirements."

Minnesota appealed the ruling, which sided with North Dakota and allied business groups, and the Eighth Circuit heard oral arguments in October. The appeals court's decision could help unleash challenges to Oregon's law or other state laws that specifically call for elimination of coal-fired power, or it could stop them before they get started.

"Fundamentally, the geologic lottery as it relates to energy resources occurred a long time before these rules were created," said Stoel Rives LLP associate Sara Bergan, who is based in Minnesota. "I imagine we'll see parties trying to flesh that out."

If anything, Bergan said Oregon lawmakers seemed to craft the coal phaseout with an eye on the Eighth Circuit litigation and the possibility the appeals court may rule that Minnesota's law is unconstitutional. Oregon's law appears to define coal-fired resources as a facility uses coal-fired power and excludes short-term wholesale purchases of power, she said.

"It's pretty difficult when you look down as far as you can, where fungible electrons are moving [across the grid], to apply state laws," Bergan said. "It looks like they're trying to avoid the unintended consequences."

Given the continued Balkanization of policies to reduce greenhouse gas emissions and the legal battles that ensue as a result, a national strategy would seem to make sense. However, a federal cap-and-trade system failed to get through Congress. That's led to the Obama administration taking regulatory steps to tackle the issue, highlighted by the U.S. Environmental Protection Agency's Clean Power Plan which slashes carbon emissions from existing power plants.

However, several states and industry groups claim the agency doesn't have the Clean Air Act authority to craft the rule, and the U.S. Supreme Court put it on hold while the legal challenges play out. With dozens of states lining up on both sides of the court fight, it's only further exposed the fault lines between states like Oregon and others that produce coal or rely heavily on coal-fired power.

"Maybe we get to the point where there's enough litigation and enough conflict where people say it's better to have national legislation than this big mess," Martel said. "But that may depend on how big the mess is, who it affects and what the national legislation would be."

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