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## **Renewable energy hits a SPEED bump in Vermont**

Is Vermont's program designed to promote the development of renewable energy illegal under federal law? That would appear to be the opinion of the Federal Energy Regulatory Commission (FERC), based on a decision the agency made a few weeks ago.

The other New England states have opted for so-called renewable portfolio standards that require their utilities to purchase or generate a percentage of their power from renewable sources. Vermont took a different approach – its SPEED (Sustainably Priced Energy Development) program.

As enhanced by the Legislature in 2009 – over the veto of Governor Douglas –SPEED now includes a “Standard Offer” program for new generators of renewable power that are smaller than 2.2 megawatts. The program essentially requires Vermont utilities to buy renewable power at premium rates, the reasonable theory being that wind, solar and other renewables could not otherwise compete with conventional sources of electricity like nuclear and fossil fuels.

The program rolled out last October 19 and was wildly popular among potential developers of small renewable facilities, many of them municipalities and nonprofits. The program called for the development of 50 megawatts of capacity altogether. On the first day applications were accepted, more than 200 megawatts of potential projects sought to participate.

The lucky 50 megawatts of winning facilities, chosen by lottery, will get 20-year contracts with their local utilities. Or maybe not, as the result of the July 15 FERC order.

At issue was a similar program in California, involving rate subsidies to “combined heat and power” generation facilities. California utilities argued that such wholesale power transactions – i.e., purchases of power by utilities for resale to their customers – are regulated by the federal government rather than the states. The FERC agreed.

As every first-year law student know, enshrined in the U.S. Constitution is the Supremacy Clause, which provides that the enactments of Congress are the “supreme law of the land.” In legal parlance, state law that conflicts with a congressional enactment is said to be preempted. The congressional statute at issue here is the Federal Power Act, which tasks the FERC with regulating wholesale power transactions.

The FERC left one door ajar. It concerns another federal enactment, the Public Utility Regulatory Policies Act (PURPA). First enacted during the Carter Administration to encourage the development of small, independent renewable power facilities, PURPA requires utilities to buy power from such producers at rates that are ultimately set by state utility commissions. But here’s the catch: By order of the FERC, the rates must be based on each utility’s “avoided cost” – i.e., what it would have cost them to generate the power themselves or buy it from conventional sources. The FERC said that a Standard Offer program that complies with PURPA would not suffer death by preemption.

Alas, the Standard Offer rates approved by the Vermont Public

Service Board are well north of any Vermont utility's avoided costs. Indeed, as the result of amendments to PURPA that were part of President Bush's 2005 energy bill, it's no longer clear what "avoided cost" really means in regions like New England that have functioning markets where wholesale power can be traded.

The Department of Public Service (DPS), which oversees the SPEED effort, formally alerted the Vermont Public Service Board of the FERC preemption decision this week. As the DPS pointed out, the federal regulators' order is still subject to rehearing motions and, ultimately, to judicial review. Somewhat pointedly, the DPS told the state regulators that it does not intend to seek rehearing of the FERC order and doesn't know what California officials will do. That, of course, is consistent with the governor's veto of the Standard Offer bill.

Whatever ultimately emerges as a final order from the FERC, this one is going to court. Meantime, though, it would appear that Vermont's signature plan to develop renewable power is in legal limbo.