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California Independent System Operator

Re: Comments on EIM Greenhouse Gas Enhancement Draft Final Proposal

Introduction

The Utah Division of Public Utilities (UDPU), pursuant to its statutory mission to advocate the public interest in utility regulation, files these comments in response to the California Independent System Operator's (ISO) request for comments on its EIM Greenhouse Gas Enhancement Draft Final Proposal. Briefly, the UDPU is concerned that Energy Imbalance Market (EIM) processes to account for California greenhouse gas compliance costs, existing and proposed, likely violate US Constitutional provisions prohibiting one state's extraterritorial regulation or unreasonable impediment of interstate commerce. The UDPU is investigating whether Utah's PacifiCorp ratepayers are being burdened by California's greenhouse gas (GHG) provisions, which have been needlessly grafted into the ISO's EIM.

Discussion

The California state policy goals at which existing GHG mechanisms and new proposals for adjustments are aimed are not inappropriate. They are firmly within a sovereign state's right to regulate. A state can require its utility customers be served with specific resources with specific attributes, such as low carbon emissions. But how those goals are achieved matters greatly in the federal system. The existing and proposed mechanisms seek to accomplish this goal by reaching into interstate markets, affecting other states' ratepayers and activity occurring outside California.

The California Air Resources Board's concern with using the ISO to regulate wholly extraterritorial secondary dispatch is a particularly egregious regulatory excursion outside California. Unlike in the Rocky Mountain Farmers Union v. Corey[1] case, which involved accounting for out of state conduct when assessing the carbon intensity of various fuels imported into California, secondary generation concerns raise the possibility that California will impose a border duty on one electricity import to account not merely for the greenhouse gas produced by

[1] 730 F.3d 1070 (9th Cir. 2012).

that electricity's generation, but also a duty to account for other generation that would fill any need left by the imported electricity's departure from its origin. While such a consideration of upstream effects might be scientifically and even economically sound, it is legally infirm because it allows California to impose upstream costs throughout the interstate bulk electric system.

In the Farmers Union case, California was allowed to take a holistic, even international, view of the carbon intensity of a fuel directly imported into California. To the UDPU's knowledge, California did not seek, and was not permitted, to calculate the carbon intensity of fuel sold in Iowa to supply a need that might have been met by the Iowa fuel that had been exported to California. In essence, adding a GHG amount to account for upstream, unimported generation is like California taxing fuel sold in Iowa because it replaced fuel sold into California and was not produced as cleanly. Even assuming an interstate electricity market can be constitutionally burdened with a GHG adder, introducing this GHG product into the electricity market unconstitutionally burdens interstate commerce by allowing one state to increase the cost of an import to account for other electricity generated and consumed wholly outside the state.

Aside from the secondary generation concern, the existing mechanism may burden interstate commerce if it alters purchases and dispatch in the interstate electricity market to account for California's purchasing preferences for another product: the environmental attributes of electricity generation. Just as one state cannot coopt the market for its regulatory purposes, one product's market should not be coopted by the market for another. By dispatching a different set of generation plants because of the GHG adder, the ISO may allow California's policy preference for the environmental attributes of electricity generation to alter the interstate market for the electricity. It will not do to say that the electricity market includes the environmental attributes when those components are traded separately throughout the industry. Allowances, RECs, and similar products are freely traded, commoditizing environmental attributes. Combining these products through the GHG adder would burden the interstate trade of electricity for dollars. This violates the US Constitution because the burden on interstate commerce outweighs the putative benefit to California.[2]

If there is a compelling state interest in achieving the goals California has set for itself, there are ways to meet those goals that do not so heavily intrude on other states' prerogatives, regulating and affecting interstate commerce. An interstate market like the EIM should be constructed to facilitate the sale of a product at a price (i.e., electrons for dollars), not to ease one state's implementation of its internal policy goals in ways that distort the chief product's sale. By distorting the interstate wholesale market transaction with the in-state GHG compliance obligation, the ISO would unconstitutionally impair interstate commerce. California can accomplish its goals with less distortion.

By simply shifting the imposition of the GHG adder away from the ISO's sale of electricity and onto the load serving entity (LSE) in California, California can mitigate this legal problem. EIM generation should clear at a price unaffected by the GHG adder. The LSE can determine whether it wishes to buy EIM generation by determining what its compliance cost might be. Indeed, given that current methods of complying with the GHG rules include buying an allowance in a secondary market, it is unclear how the end result is any less effective in meeting California's

[2] See, Pike v. Bruch Church, Inc., 397 U.S. 137 (1970).

GHG goals. The LSE can buy its GHG compliance separate from buying its electricity. Thus might California meet its goals while not burdening the interstate market for electricity.

Conclusion

The ISO must take great care in considering California's GHG policies in the EIM. As an interstate market, the EIM should be a wholesale market for the purchase of electricity for a price. It must not be coopted to implement California's GHG policies in a way that alters the market's price, choice of resources, and the like. California's LSEs can comply with California's GHG policies outside the EIM, whether by contracting for or owning compliant resources or by purchasing allowances or other products of the type that current and proposed policies would foist on the EIM's generators. As it stands, existing and proposed GHG mechanisms in the EIM likely violate the US Constitution and should be discontinued, leaving California to enforce its own regulations within its own borders.