



Colorado's RES Case Heads to 10th Circuit Appeals Court

by Dr. David Schnare, General Counsel

In May, the U.S. District Court for Colorado cleared the path for appellate review by the U.S. Court of Appeals for the 10th Circuit of the question as to whether Colorado can force renewable energy producers in other states to meet Colorado regulations. The District Court decision is in stark contrast to a decision handed down only three weeks ago by the U.S. District Court for Minnesota. The decisions of the two courts are diametrically opposed. The U.S. Court of Appeals for the Ninth Circuit reflects this major split in the judiciary. In that case, heavily relied on by the Colorado District court, a two-to-one decision by a panel of the 9th Circuit received a vigorous dissent from seven other 9th Circuit judges.

The Colorado renewable energy mandate establishes renewable quotas that can only be met through generation that meets Colorado's renewable energy definitions. While some of the renewable energy used in Colorado is produced in-state, much of it does not. To meet Colorado quotas, local electric utilities must purchase renewable energy "credits" that meet Colorado regulatory definitions. Since many of these credits must come from outside Colorado and are part of the interstate market for renewable energy credits, the Colorado regulations reach beyond state borders. The Colorado court held this was not "extraterritorial"

regulation. The Minnesota Court held that it was. The Tenth Circuit will now have to decide whether it agrees with the Minnesota court's decision or the Colorado court's decision, whether it agrees with the two judges in the 9th Circuit Court of Appeals or the 7 judges in the 9th Circuit Court of Appeal. The seven judge dissent in the 9th Circuit argues that the two-judge decision reverses long-standing jurisprudence in not only the 9th Circuit but the law as decided by the Supreme Court. We believe the Supreme Court jurisprudence is correct and we plan to make that argument before the 10th Circuit.

The decision reaches no farther than the borders of Colorado and perhaps not even that far. Because the law on these questions is unsettled, all 30 states with similar regulatory quotas will watch with great attention what next happens in the appellate court.

As an environmental matter, the Colorado renewable energy mandate has had no meaningful impact on air quality within the State. Colorado met all National Ambient Air Quality Standards related to electricity production many years ago and the air has been safe to breathe ever since. The effect of the Colorado renewables quotas has no measurable effect on global warming or local weather or climate, at most it would prevent 0.0029 degree of warming.



Obama and the American Lung Assn.

President Obama is enlisting the aid of the American Lung Association to shill for the new EPA carbon emissions regulations. And the ALA is willing to oblige...for a price.

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NSA Preserves Key EPA Records

A FOIA request to the EPA took a bizarre turn for E&E Legal. After the EPA claimed the records in question had been destroyed, they turned up at all places at the NSA!

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TVA FOIA Foibles

The TVA joins the IRS, NSA, Justice Department, and others who carry out this Administration's political agenda. Our FOIA seeks to find out TVA's level of complicity.

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Hocking Halos for Profit and Political Gain – The Obama Administration and the American Lung Association

by Clifford Smith, FME Law Counsel



On June 2, the Obama Administration's Environmental Protection Agency (EPA) unveiled regulations that require states to cut carbon emissions 30 percent by 2030. A radical, unilateral move that will cause energy prices to "skyrocket", cost countless jobs, and disproportionately hurt the poor, it's not surprising that the Obama Administration sought to enlist allies that would put a more friendly face on these radical regulations. In this case, the face the Administration sought to is that of the American Lung Association (ALA). On the very same day these regulations were unveiled, a publicly announced telephone "briefing" between President Obama and ALA was touted to news organizations and pushed by the White House and the ALA.

Most Americans probably know of the ALA from their anti-smoking campaign, and have generally favorable views of them as a respectable and well known health charity. Indeed, the organization was originally founded as a vehicle to help people with tuberculosis. However, looking deeper into the ALA's recent history demonstrates that the group has long since transitioned from a traditional health charity to big money Washington, DC lobbyists, often funded at the taxpayer's expense or by questionable corporate backers, supporting or opposing causes for money that are only loosely related to any sort of health charity cause. In his research paper, "Pandering for Profit: The

Transformation of Health Charities to Lobbyists", economist James Bennett explained that "[T]he ALA has mutated into a powerful lobbying organization by selling its reputation; the ALA has 'hocked its halo' in order to do well while purporting to do only good."

Indeed, it is clear "halo buying" is exactly what the Obama Administration is doing in cloaking itself in the ALA, and the ALA are quite willing to part with their halo for the right price. The EPA's radical new rules are supposedly being created to combat climate change, yet the ALA's press release on the regulations focuses on public health, stating that, "Evidence is clear that pollution from power plants is harming the health of our nation." In other words, the Obama Administration just wants the regulation to get through for political purposes, and it will use whatever PR methods and front groups or rationalizations that it can to ensure the regulation sticks.

Many of ALA's claims are also highly debatable, as one might expect from a lobbyist who represents an interest group as opposed to an unbiased observer. Much of ALA's push in favor of ever stricter controls on power plants is a claim that pollution from such plants contributes to increased asthma rates. Yet overall, current understanding of risk factors for asthma are best summarized by Dr. Peyton Eggleston, who noted that, "Our understanding of the environmental influences [of asthma] is still in its infancy, but we can say that indoor exposures are more important than ambient pollutants and that bioaerosols containing allergenic proteins are especially important." This is supported by increasing asthma rates compared to decreased air pollution levels. As Dr. Julie Goodman explains, "This indicates that lowering ambient criteria pollutant concentrations below current health-

protective NAAQS will not have a meaningful impact on asthma."

But the ALA is now a political/lobbying organization, not a medical charity, and it acts as such. The same week as the regulations were unveiled, the ALA began a nationwide television campaign on many popular cable channels, touting the new rules in perfect coordination with the Obama White House's public relations machine. This behavior is neither unusual nor unique for the ALA. Indeed, it is a large part of what the ALA does in its current form. It engages in politics and lobbying for those who can contribute to it financially and in terms of power and influence. FOIA requests made by the Energy and Environmental Legal Institute (E&E Legal) reveal that the ALA is not only frequently engaging in nakedly political activity, such as running political ads in the district of Congressman Fred Upton, Chairman of the Energy and Commerce Committee, and publishing other ads in political magazines like Roll Call and Congressional Quarterly, but that the first thing they do when they engage in such political activism, lobbying and other influence peddling is to brag about it to their friends in the EPA. The email trail shows that news of their activism is quickly reported by the ALA to top EPA officials. Beyond that, its lobbying efforts around Washington DC are well known on a whole host of issues, many only tangentially related to its original cause. arly, these are not the kinds of activities one would expect from a "health care charity," which is what most Americans believe ALA is. Yet, by "hawking its halo," and engaging in these kinds of political activities, the ALA is making lots of money. This money comes both from self-interested private sector donors and, even more troubling, from public sector grants. The EPA has given over \$20 million dollars in grants to the EPA
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The Hunt for Missing EPA records goes to the NSA

by Chaim Mandelbaum, FME Law



On June 5, 2013, the first of a series of news stories appeared revealing the extent of the information leaked by NSA contractor Edward Snowden. Ultimately, this information exposed a massive effort on the part of the National Security Agency (NSA) to collect “metadata” about electronic communications such as emails, phone calls and text messages going on in the United States. Metadata is the information about an electronic communication such as the duration and time of the communication, the sender and recipient of the communications, etc. However, metadata does not include the actual content of the communication. These revelations quickly spawned a national conversation about privacy and security in the United States. Importantly however, these revelations also dropped a new tool into the laps of those groups and individuals working on another important, though less public, story; the effort to recover public records that employees at the Environmental Protection Agency (EPA) had destroyed.

The story shifts to the EPA where Regina McCarthy is the Administrator of the EPA. Prior to this she was the Assistant Administrator for Air and Radiation within the same agency. Lisa P. Jackson was her predecessor as Administrator of the EPA. Both women stand at the center of this story of missing or destroyed public records.

As part of her job, the EPA provided Ms. McCarthy with a cell phone to use to make calls and to

send text messages for agency business. While on the job, she sent and received thousands of text messages from her EPA (and tax dollar) provided cell phone. Attorney Chris Horner, on behalf of the Competitive Enterprise Institute (CEI), became interested in how she was using this taxpayer funded device, and submitted a Freedom of Information Act request seeking her text messages from various dates. Eventually, EPA’s failure to comply forced CEI to sue the agency to get it to comply with the request. At this point, the EPA admitted that none of the text messages sent by Ms. McCarthy existed anymore since they had all been deleted.[1]

Ms. McCarthy’s predecessor as Administrator of the EPA, Lisa P. Jackson, was also involved with another controversial effort to hide records. Horner through FOIA requests showed that Jackson was using an email address under a fake name, Richard Windsor, in order to send and receive work emails, which made it less likely for FOIA and Congressional requests to discover these emails. Eventually, they also discovered that she was sending work related emails using her personal Verizon and Blackberry email accounts. The uncovered emails showed she has asked lobbyists to email her on these personal accounts. As a result, Horner initiated a FOIA request to see all the work related emails sent on her personal accounts. Yet EPA told them that all such emails were gone. They had been deleted.

Federal agencies have an obligation to preserve federal records under the Federal Records Act (FRA). The FRA provides a broad definition of federal records and requires that agencies preserve all records, including electronic records, like emails or text messages, which deal with agency or public business. Even when using private resources, like personal email accounts or cell phones, if a communication involves

public business, then it is a public record. In such cases the employee has to forward the communication to the agency, which is supposed to preserve and archive it. [2]

The effort to recover these lost public records seemed to have hit a dead end, but that was before Mr. Snowden and various news agencies made revelations about the NSA data collection program. Because of its effort to scoop up communications, the NSA likely acquired the metadata about the missing McCarthy text messages, and Jackson emails. This metadata is especially important because of the justifications given by the EPA for the missing records. In both cases the EPA claimed that all the communications were for personal purposes and none involved agency business, thus none of the communications were public records requiring preservation under the FRA. The very metadata collected by the NSA would prove or disprove these EPA claims. Determining the subject lines of emails and the recipients of messages that were sent would show whether the messages were being sent to work colleagues and lobbyists. Likewise, determining when messages were sent would show if they had been sent during work hours. Further once it was determined what other parties had been involved in these communications, it would become easier to recover all of these missing public records.

After the information about the NSA data collection program came to light, it became clear that the NSA might have collected the information needed to recover the missing EPA records. So the Energy & Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FME Law) sent a FOIA request to the NSA asking for the metadata from Lisa P. Jackson’s personal Verizon and Blackberry email accounts, both of which she used in her role as Administrator to the EPA
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Tennessee Valley Authority FOIA Foibles: *Why the TVA is starting to look like the Obama IRS*

by Clifford Smith, FME Law Counsel



When most Americans think of the Tennessee Valley Authority (TVA), they probably think of the Great Depression and Franklin Delano Roosevelt's New Deal public works programs designed to employ the unemployed masses in the rural south. The program was popular and fairly successful in providing cheap power to area customers. As a result of its popularity the program survived long after the depression finally ended. The TVA has expanded and grown over the years, becoming a huge supplier of power. While it is a government owned corporation, it still has a significant amount of independence and isn't as politically "charged" as many other government agencies.

However, the current Administration has managed to politicize everything from the Department of Justice to the Internal Revenue Service. In such an environment, even a nominally independent agency like TVA has thus began to feel the pressure to comply with an explicitly political agenda. Reports indicate that the Obama Administration was intent on using all possible government agencies to crack down on climate change (read: to destroy the coal industry). To accomplish this the Administration put forward its "Climate Action Plan," which was "voluntary" for independent agencies like the TVA. To learn more about TVA's actions with regard to this plan, The Energy & Environment Legal Institute (E&E Legal)

along with the Free Market Environmental Law Clinic (FMELC), decided to file a Freedom of Information Act (FOIA) request seeking information about TVA's strategy to implement this "voluntary" plan, and to learn how it might affect rate payers and the energy industry as a whole.

While it is not uncommon to face resistance for FOIA requests that might potentially embarrass the powers that be, smaller government agencies like TVA tend to comply with FOIA laws more easily and readily than more politicized agencies like the EPA, and the IRS. TVA, however, responded with a surprising level of unprofessional politicization and vitriol.

Some of the most important parts of the FOIA law for non-profit organizations are the fee waiver provisions, which entitle non-profits, media and educational organizations to waived or reduced fees for producing the documents these groups requested under FOIA. Without a fee waiver, non-profits like E&E Legal and FMELC are prevented from doing their jobs because the prohibitive costs of FOIA requests would functionally block their requests since they would be cost prohibitive. Indeed, legislative history indicates it was precisely to ensure non-profits, media and educational organizations would hold government accountable that legislators wrote these provisions into the law in the first place. FOIA requesters often ask for these fee waivers, and agencies often grant such waivers as a matter of course. If an agency denies a fee waiver then of course, requesters have a right to appeal within the agency to seek judicial remedies, and so forth.

In this case, without either waiving fees or denying fee waiver, TVA responded to E&E Legal and FMELC's request with an unprece-

dent and invasive, 21-point questionnaire. The questionnaire repeatedly asked the requesters if the information on their websites was "accurate" and asked requesters to describe their "lobbying" activities, which non-profit organizations are prohibited from engaging, and asked about the "interlocking" nature of requesters' organizations, among numerous other questions probing into the details of the requesters' business practices. Essentially, they were questioning the status of E&E Legal and FMELC as non-profits. It was almost as if the requesters, rather than TVA, were the subject of a FOIA request. It is worth noting that the requesters had already included 17 pages in their initial request fully explaining the facts and law relevant to the agency granting a fee waiver under FOIA.

This questionnaire was scandalous and reminiscent of the IRS's widely publicized targeting of various "Tea Party" and other conservative groups who were also sent invasive, wildly inappropriate questionnaires. In one sense, TVA's actions were even worse than the IRS's past acts, as at least the IRS had the authority to determine the status of these organizations, even if it had blatantly abused its tax collecting power. The TVA, on the other hand, was attempting to abuse power it didn't even have. It had no authority whatsoever to determine the status of non-profit organizations or to probe into their business practices.

Nonetheless, the requesters responded amicably, without giving in to TVA's bullying, by answering the questions they could in good conscience answer, and providing TVA proof of the IRS's determination that they were, in fact, non-profit organizations. Requesters also pointed out that TVA lacked the authority to determine the requesters' status.

TVA's response was to double down. They excoriated (*continued on page 5*)

Hocking Halos (cont.)

in the past 10 years. And by pushing this radical political agenda and holding themselves out to the highest bidder, ALA has abandoned their core mission. It is undeniable that these new EPA regulations disproportionately hurts the poor by causing a rise in energy prices, and those in the bottom fifth of the economic bracket spend nearly a quarter of their money on energy, while those in the top fifth spend only 4%.

"In essence, the Obama/ALA Agenda is a massive transfer of wealth from the poor to the wealthy and well connected; an odd agenda for an administration that claims to want to fight inequality. The end result is that the Obama/ALA agenda will take food off our children's table

and opportunity out of their future through the false alarmism spewed out of single interest environmental activists," said Dr. David Schnare, a scientist and a lawyer who worked at the EPA for nearly three decades.

The ALA is not the only charity selling its soul to the highest bidder. Since the late 80's, other medical charities have followed a similar path for a variety of reasons related to changes in the way these charities were regulated as well as increasing federal government regulation in areas loosely related to their mission. But the ALA has done the best for itself by being the public face of radical environmental causes. Given the well-known desire of more conventional "green" groups to explicitly destroy the coal industry, a position the Obama Administration

still claims it opposes in spite of mountains of clear evidence to the contrary, it is understandable that he would shun more conventional green groups as part of his PR push and seek out a group like the ALA to put a "halo" over his efforts.

Yet people should not be fooled by the Obama Administration's attempt to cloak themselves in a "charity" like the ALA, which has long since abandoned its charitable mission for political power, selling its "halo" to politicians who need it for PR reasons. The underlying policies that the Obama EPA is backing is still part of the same radical, unbalanced, unilateral and unscientific agenda, regardless of the misguided public relations campaign put behind it, be it cloaked in the ALA or not.

TVA FOIA Foibles (cont.)

E&E Legal and FMELC's response, implying they were acting illegally as "middle-men" for unnamed "supporters," and making sweeping claims that requesters had an "apparent lack of understanding of TVA and its activities," a false charge that was not up to TVA to determine in any event. They also took a new and unprecedented step of listing other various organizations, that E&E Legal and FMELC management and counsel had previously or concurrently been employed by accusing them of being "alter-egos," before finally denying a fee waiver and giving a fee estimate of almost \$500 dollars for a few emails.

It could not escape notice that if TVA had taken the same amount of time to find and produce the records that it had in investigating the requesters personnel's past employers and writing invasive questionnaires, the entire task would long since have been accomplished. However, now having a concrete denial of a fee waiver and a fee estimate, the requesters paid under protest, and

promptly appealed TVA's decision. In their appeal, they demonstrated not only that TVA was incorrect in not granting them a fee waiver, but also that TVA was acting well beyond the scope of its authority, and that it was not complying with the law. The appeal also pointedly explained that E&E Legal and FMELC intended to litigate this matter fully if their request was not granted promptly.

TVA suddenly backed off, maybe because they believed they would lose in court and/or they would embarrass themselves publicly. They granted the fee waiver and produced approximately 60 pages of emails. Interestingly, TVA also gave a detailed list of redactions made in these documents, explaining what was redacted and why. Such a list is actually required by statute, but it is frequently ignored in practice by many agencies unless the issue is forced by the courts.

Unfortunately, while the documents give some information, namely just that TVA is in fact engaged in considering how to respond to the Obama Administration's "Climate Action Plan," and

that TVA has met with groups such as Sierra Club to discuss issues related to the Administration's plan; much of the discussion concerning its implementation is redacted. Some of the redactions appear to be improper, and E&E Legal and FMELC are currently evaluating their options.

TVA's imperfect and belated response would be troublesome enough. Its vitriolic, unprecedented assault on the requesters in response to efforts at transparency shows just how politicized even nominally independent agencies like the TVA have become as a result of radical environmental policies. This makes the mission of groups like E&E Legal and FMELC more difficult, and even more essential.



NSA's EPA Records (cont.)

to conduct public business. CEI followed with another FOIA request to the NSA asking for the metadata from the phone the EPA has issued to Regina McCarthy.

The NSA responded to both FOIA requests with a “Glomar” response. This response, created in *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), permits an agency to “neither confirm nor deny” the existence of the records sought. The name comes from the Glomar Explorer, a large salvage vessel built by the Central Intelligence Agency (CIA) for its covert “Project Azorian” — an attempted salvaging of a sunken Soviet submarine. In February 1975, journalist Harriet Ann Phillippi requested that the CIA provide disclosure of the existence of the Glomar, to which the CIA chose to “neither confirm nor deny” the project’s existence. The courts agreed with this response, saying that either confirming or denying the existence of the records would provide information about whether or not secret programs existed.

However, agencies cannot use Glomar responses all the time. Its use is limited to when the nature of the material being sought justifies secrecy and the agency provides “as much information as possible” to justify its

claim. Further, an agency cannot give a Glomar response when it has already disclosed the existence of the records being sought. While the NSA claimed when issuing its response that leaks of classified information did not prove the existence of the program, the country has a far stronger source than Edward Snowden to prove that the NSA collects metadata. During a press conference on June 7, 2013, President Obama acknowledged the existence of the NSA program to collect metadata. He stated, “As was indicated, what the intelligence community is doing is looking at phone numbers and durations of calls. They are not looking at people’s names, and they’re not looking at content. But by sifting through this so-called metadata, they may identify potential leads with respect to folks who might engage in terrorism.”[2]

When a program’s existence has been acknowledged publicly by as substantial an authority as the President of the United States, an agency like the NSA cannot give a Glomar response to try and hide whether or not such a program exists. E&E Legal and FME Law made this point to the NSA in their appeal of the NSA Glomar response. Yet the NSA continued to refuse to provide any records of the EPA communications, or even acknowledge that it collected and stored the metadata

from EPA communications.

As a result of the unwillingness on the part of the NSA to help recover EPA records that were destroyed in violation of the FRA, CEI joined E&E Legal and FME Law to file suit against the NSA. They jointly filed suit on the one year anniversary of President Obama’s press conference admitting the existence of the NSA metadata collection program, highlighting the fact that this is no secret program, but instead one the President himself has acknowledged. The lawsuit seeks to force the NSA to provide the metadata on the missing or destroyed EPA communications so that the long effort to recover EPA records and to hold those responsible for their destruction accountable can continue.

[Footnote 1] See Answer in *CEI v. Environmental Protection Agency*, D.D.C. No. 13-779 (filed 7/19/2013) at ¶ 8 (conceding that such texts were sent by EPA Assistant Administrator Gina McCarthy), ¶21 (conceding that EPA provides such officials “with personal digital assistants that have text messaging capability”), ¶¶14, 33 (EPA currently unable to locate such records); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 9/9/2013 3:46 PM (admitting that “Ms. McCarthy uses text messaging,” but arguing that “they were not required to be preserved by the Agency.”); Email from Michelle Lo, counsel for EPA, to Chris Horner and Hans Bader, counsel for CEI, at 8/1/2013 7:25 PM (conceding that “Ms. McCarthy used the texting function on her EPA phone,” and that “none of her texts over the period encompassing the 18 specific dates at issue in CEI’s FOIA request (July 9, 2009, to June 29, 2012) were preserved”).

[Footnote 2] United States Government Accountability Office, “Report to the Ranking Member, Committee on Finance, U.S. Senate: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION. Oversight and Management Improvements Initiated, but More Action Needed,” GAO-11-15, October 2010, www.gao.gov/assets/320/310933.pdf, p. 37.



E&E Legal General Counsel David Schnare (center), leads a discussion as a panelist at George Washington School of Law’s one-day conference on balancing academic freedom and open record laws. The conference, which occurred on April 1, centered on the case, *American Tradition Institute v. The University of Virginia*, which was the result of UVA not turning over FOIA’ed e-mails from its former professor and Climate Scientist Michael Mann of the (in)famous “Hockey Sticks” research.

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