

Submitted by Todd Mason, Wynn Resorts, April 5, 2017

To: Erik Hansen

From: Bill Peterson

Question Presented: Is AB 206 Constitutional?

Short Answer: No, AB 206 is Unconstitutional if it operates retrospectively (as it appears to do) because retrospective application would violate the principle against retroactive application of law, a violation of substantive due process, and a violation of the prohibition of enactment of law that impairs contracts.

Facts

Assembly Bill 206 contains several provisions that would subject eligible customers who have already departed NV Energy's system to a renewable energy procurement standard that is higher than the standard in existence at the time the PUCN issued its order approving the eligible customers departure from the system. This purpose is made clear in multiple sections of the Bill. First, the preamble to the Bill states that the Act requires the PUCN to revise any existing portfolio standard applicable to a provider of new electric resources to comply with the portfolio standard established by the Act (much higher). This suggests that the standard applicable to customers who have already departed the system are to be revised to current standards as they evolve over time. Second, the legislative digest commentary to the Act states that the amendment imposes the new portfolio standard on providers of new electric resources that were previously exempt under NRS 704.130. This suggests that the standard is intended to apply retroactively to exempt providers. Third, and perhaps most importantly, the amendment to NRS 704.78213 set forth in AB 206 expressly requires an eligible customer to procure renewable energy in amounts set forth in the new standards, as opposed to amounts set forth in the

standards in existence at the time of departure. In other words, the bill requires an eligible customer to increase the amount of renewable energy it must procure from a provider of new electric resources to current standards, and to maintain, at all times, the amount of renewable energy in its portfolio as may be required by the standards as they change or evolve over time.

The practical effect of the Bill is to eliminate the economic protection previously afforded departing customers from progressively increasing renewable energy portfolio requirements. For customers who have already departed the system, this change significantly alters and disrupts their investment backed expectations regarding the costs associated with their decisions to depart from the system and to procure energy from providers of new electric resources.

The Statute Violates Numerous Constitutional Provisions

Having made their deals with the state (which regulates departure from the system), any retroactive adjustments to that deal by the state to the detriment of previously departed customers, violates important principles of federal and state constitutional law, including the policy against retroactive application of law, violation of substantive due process, including the deprivation of vested rights, regulatory takings, and prohibitions against impairment of contracts. If the Bill did not have retroactive application, its effect would not alter or disrupt legitimate investment backed decisions or vested rights of customers who have already departed the system, but the law might still run afoul of the “dormant commerce clause” in the United States Constitution, which precludes states from enacting laws that either discriminate against or substantially impair interstate commerce. These topics are not addressed because the bill is unconstitutional on retroactivity grounds alone.

Prohibition Against Retroactive Application of Law

Legislation that impairs or upsets reasonable investment backed expectations by retroactively imposing new legal standards or requirements on persons or entities is always suspect. It is for this reason that courts go out of their way to avoid any imputation that legislation is intended to operate retrospectively, because retroactive application of law is usually prohibited: “[E]ven though a statute operates only from the time of its enactment, it is retroactive if it impairs (a) vested rights and past transactions” (State v Las Vegas Metropolitan Police Department, 124 Nev. 138, 179 P.3d 542 (2008)), or, (b), preexisting obligations or constitutional rights. Farmers Home Mutual v Fiscus, 102 Nev. 371, 725 P.2d 234 (1986). In AB 206, the intent of the legislature seems clear, leaving no room for a court to save the statute by interpreting it to have prospective application only. (See discussion above). The proposed statute violates both prongs of the prohibition against retroactive application of law because it impairs (a) past transactions (prior contracts entered into on the assumption of the existing energy portfolio) and, (b) vested rights. This is because the order of the PUCN approving and conditioning Wynn’s departure from the system on compliance with various economic conditions and considerations, such as (1) exemption from costs associated with new renewable contracts, (Modified Final Order Paragraph 111), and (2), requirements (specified in great detail) to comply with the then existing portfolio standards in NRS 704.7801 to NRS 704.8937. See Modified Final Order paragraphs 283 and Ordering Paragraph 13. An order or judgment is a vested right, including an order from the PUCN. Badger v Eighth Judicial District Court, 373 P.3d 89 (Nev. 2016). “Settled expectations of parties should not be disrupted by law and retroactive application of law undermines rule of law.” Sandeointe Apartments v Eighth Judicial District Court, 313 P.3d 849 (Nev 2013).

The Proposed Statute Violates Wynn’s Substantive Due Process Rights

Imposition of new requirements that impair or disrupt investment backed expectations fostered by an existing statutory or regulatory scheme are frequently declared unconstitutional under the due process and taking clauses of the constitution. In *Eastern Enterprise v Apfel* 594 U.S. 498 (1998) the court struck down a statute that retroactively required a company to contribute to an injury or illness fund after the company had left the business or industry that caused those injuries and illnesses. In that case the court held that imposition of new funding requirements interfered with Eastern’s reasonable investment backed expectations to leave the industry, thereby “depriving it of settled expectations that upset past settled transactions.” *Id.* at 500. Likewise here, Wynn made a carefully calculated estimate of the costs and benefits associated with complying with the existing portfolio standards when it exited the system, made a significant investment in that decision, and had a reasonable expectation that those standards, expressly set forth in the statute, and expressly incorporated into the exit order, would continue to apply from and after the date of exit. That expectation is manifested in the statutory language itself (that AB 206 now seeks to retroactively abrogate) that stated the standard that would apply in the future “*was the standard in effect on which the order approving the application or request is approved.*” NRS 704.78213(1). That provision of the statute was a critical element on which the calculation and investment decision was based, and it was expressly incorporated into the PUCN order itself. Abrogation of that provision seriously and substantially upsets Wynn’s settled and reasonably backed investment expectations and is therefore unconstitutional.

AB 206 Is Unconstitutional Because It Impairs the Obligation of Contracts

The state and federal prohibitions against impairment of contracts is also based on principles underlying the policy against retroactive application of law. U.S Const. Article I

Section 10, Nevada Constitution Article I section 15. These provisions prohibit the government from passing any law that impairs the obligation of contracts. The principal elements involved in considering whether a law impairs the obligation of contract are (1) is there a contract, (2) is it impaired by a law, and (3) is the impairment substantial. *McGrath v Rhode Island*, 906 F. Supp. 1995 (D. R.I. 1995). If a statute is determined to create a right or obligation, then it may not be subsequently impaired. *Id.* at 758, In *McGrath* the legislature amended a statute to preclude military servicemen from purchasing retirement credit based on their prior military service. The statute was held unconstitutional under the contracts clause because the right to purchase credit was an important element of the consideration that went into the decision to accept employment. It is frequently the case that violation of the contracts clause also operates as a violation of substantive due process as well, by depriving a person of an important liberty or property interest. Thus, in *Greyhound Food Management v City of Dayton Insurance Company*, 653 F.Supp. 1207 (D. Ohio 1986) a statute purporting to eliminate rights of subrogation claims against a City were held to violate the substantive rights of insurance companies to seek subrogation on already issued policies.

Likewise here, Wynn entered into contracts providing for renewable energy on the basis of an existing portfolio standard, and Wynn negotiated prices, terms and conditions based on that assumption. It also believed it had the right to rely on the right and benefit expressly conferred by statute that the portfolio standard would be fixed going forward. SB 206 impairs Wynn's contract rights by now requiring it to procure energy at a different price, in different quantities and on different terms than were negotiated and consummated at the time the exit order was entered, and deprives it of the economic benefit it bargained for in insuring that its renewable procurement obligations were fixed on an ongoing basis. The bill upsets these settled, and

bargained for expectations, in a manner that substantially impairs Wynn's existing procurement contracts and its substantive rights respecting its future contractual obligations.

Conclusion

AB 206 is unconstitutional because it applies retroactively. The statute cannot be saved by construing it to have only prospective effect, because the statute plainly says otherwise. Retroactive application of law is normally suspect and unlawful, especially if it upsets or impairs settled expectations, and investment backed expectations of persons or parties relying on the existing law at the time they made those investment backed decisions. The law is also unconstitutional because it violates Wynn's substantive due process rights regarding its contract rights and obligations because those rights and obligations were based on existing law, which law expressly provided that the portfolio standard that would always apply to Wynn, was the standard in effect on the date the order of departure was approved.