UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of North Dakota, et al, Plaintiffs, v. Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, et. al., Defendants.	Civil File No. 11-CV-3232 (SRN/SER)

BRIEF OF AMICI MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, ENVIRONMENTAL LAW & POLICY CENTER, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, FRESH ENERGY AND IZAAK WALTON LEAGUE OF AMERICA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Amici submit this brief in support of Defendants' motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

Like all states, Minnesota extensively regulates utilities serving its citizens, including rates, return on investment, service reliability, and the generating resources utilities may construct or rely on. As the Federal Energy Regulatory Commission ("FERC") recently stated, "states have the authority to dictate the generation resources from which utilities may procure electric energy." *California Pub. Utilities Comm'n*, 134 FERC ¶ 61044, 61160 (Jan. 20, 2011). The Next Generation Energy Act ("NGEA") is simply another exercise of that authority. The NGEA provisions at issue (Minn. Stat. §216H.03, Subdivisions 3(1), 3(2) and 3(3)) provide that "no person shall":

> (1) construct within the state a new large energy facility that would contribute to statewide power sector carbon dioxide emissions.
>
> (2) import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or
>
> (3) enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions. For purposes of this section, a long-term power purchase agreement means an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years.

These provisions share one phrase: "statewide power sector carbon dioxide emissions." which Minn. Stat. §216H.03, Subdivision 2 defines as:

> the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota. Emissions of carbon dioxide associated with transmission and distribution line losses are included in this definition.

Thus "statewide power sector carbon dioxide emissions" means all of the CO_2 emitted by production and transmission of electricity consumed in Minnesota. The NGEA has not been applied – and in Amici's view would not apply -- to electricity sales to the Midcontinent Independent Service Operator (MISO) from new plants outside of Minnesota that lack any contractual relationship with a Minnesota utility.

Subdivisions 3(1) and 3(2): the "new coal plant provision". These first two provisions focus on new coal plants. Subdivision 3(1) bars construction in Minnesota of a "new large energy facility" that would contribute to statewide power sector CO_2 emissions; 216H.03 Subd. 1 defines "new large energy facility" as a coal-fired power plant that begins operation after January 1, 2007.

Subdivision 3(2) then addresses power from such new plants located elsewhere, and does not allow anyone to "import or commit to import" power from those plants. When read together with "statewide power sector carbon dioxide emissions", it applies only to power both imported into, and consumed in, Minnesota.[1]

Finally, like Subdivision (3)(1), this section provides that CO_2 emissions from such new plant power may not "contribute to" statewide CO_2 power sector emissions. Since any CO_2 would "contribute to" such emissions, this covers any amount of power from a new coal plant.

Subdivision 3(3): the "PPA provision". In contrast to the new coal plant provision, which covers all transactions, this section restricts only the specific

[1] The NGEA has not been applied – and in Amici's view would not apply -- to new plants outside Minnesota and with no contractual relationship to a Minnesota utility simply because of sales to the Midcontinent Independent Service Operator (MISO).

arrangement known as a "power purchase agreement" ("PPA") with existing large power plants. (While technically also applying to new plants, the new plant provision already covers all power purchase transactions.)

Unlike the new coal plant provision, which bans power that "contributes" to statewide power sector CO_2 emissions, the PPA provision only forbids power that "would *increase* statewide power sector carbon dioxide emissions". Although the NGEA provides no baseline for determining whether a PPA would "increase" emissions (*e.g.*, whether compared to 2007 emissions, a prior year's emissions, an earlier contract, etc.) neither the NGEA nor the Minnesota Public Utilities Commission ("PUC") has defined what "increase" means.

Carbon Offsets. The NGEA provides that neither the new coal plant nor PPA provisions apply "if the project proponent demonstrates to the Public Utilities Commission's satisfaction that it will offset the new contribution to statewide power sector carbon dioxide emissions with a carbon dioxide reduction project." Minn. Stat. § 216H.03, Subdivision 4.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

New Plant Provision Claims

Four plaintiffs claim injury from the new coal plant provision; none from the provision itself, or by any PUC interpretation or application, but rather only by positions that defendant *Minnesota Department of Commerce* ("MDOC") has taken regarding this provision in two PUC proceedings where the PUC itself – the agency charged with interpreting and administering it -- has not decided the issue. For a federal court to

decide the constitutionality of a state statute where the responsible state agency has (1) never interpreted or applied it so as to injure plaintiffs, (2) may yet agree with plaintiffs and interpret it so as to eliminate their claims, and (3) may in fact do so in a pending proceeding with one of these very plaintiffs, raises three fatal jurisdictional impediments: plaintiffs have suffered no Article III injury-in-fact, these claims are not ripe, and this Court must abstain from deciding these claims.

Basin Electric ("Basin") is an electric utility serving Minnesota customers. Its claimed injury rests on the position MDOC allegedly took in PUC Docket No. 08-846. There, after the PUC had approved Basin's resource plan that included the new Dry Fork plant, Basin asked the PUC whether and how the new coal plant provision applies to sales from Dry Fork to the Midcontinent Independent System Operator ("MISO"). Pl. SJ Br. 19. "MDOC recommended that the [PUC] require Basin to submit an analysis as to 'whether the provision of power to MISO'" violated the NGEA. *Id*. Basin did so, but "[d]espite this, the [PUC] did not approve the transfers. Instead, the [PUC] has since been silent on the issue[.]" *Id.*

Because "MDOC has indicated" that Dry Fork's power "triggers the NGEA", Basin has "serious concerns . . . about its future use of Dry Fork." Pl. SJ Br. 11. MDOC's position "also raises concerns about the possible development of future projects" (*id*.) and "Basin Electric undertakes actions on a daily basis *that might be construed* to be violations of [the new coal plant provision] given the expansive interpretations *offered by [MDOC]* in the Dairyland and Basin Electric dockets." Rutter

Decl. ¶10 (emphasis added). (The Dairyland docket is explained below.)[2] Yet Basin has since operated Dry Fork without any adverse action by the PUC.

Plaintiff MRES has considered "transactions that would involve purchasing new assets and/or entering into long-term power purchase agreements that involve the development of generation sources that would be considered new large energy facilities" (Pl. SJ Br. 13), and has been injured because it "devoted significant resources towards evaluating the impact of the NGEA in the viability and feasibility of the project." Wahle Decl. ¶22.[3] (Notably, the referenced plant -- Sutherland 4 – was cancelled for reasons unrelated to the NGEA, namely "the current financial, political and environmental landscape" (Ex. 1).)

Again, the "impact of the NGEA" stems from "MDOC's interpretation of the statute in the Dairyland proceedings." Pl. SJ Br. 13. Dairyland Power Cooperative is another utility serving Minnesota customers, and this issue in this proceeding (PUC Docket No. 08-113), was again MDOC's alleged view of how the new coal plant provision applied to transactions with MISO. However, as plaintiffs admit, "the MPUC

[2] Basin is displeased that the PUC has not decided this issue as quickly as Basin would like. *Basin itself asked the PUC not to decide this issue until this litigation was concluded*: "Since the constitutionality of the [NGEA] is currently the subject of litigation, Basin Electric would respectfully suggest that this question and the issues it poses should be deferred pending the outcome of the litigation." Raatz Decl. Exhibit C, p. 3.

[3] Although plaintiffs' brief says there were "at least two" such affected transactions (Pl. SJ Br. 13), MRES identifies only one, involving Alliant Energy's Sutherland 4 plant. Wahle Decl. ¶22. MRES alleges NGEA impacts on two other plants, Edgewater 5 (commissioned 1985) and Boswell 4 (commissioned 1980), both of which were operating before the new coal plant provision's January 1, 2007 effective date. *Id.* ¶¶ 23, 24.

ultimately concluded that Weston-4 [the new plant] was exempt" from the NGEA" (Pl. SJ. Br. 18), and thus the PUC *never decided* the MISO transaction issue.[4]

Two other plaintiffs, who are merely considering building new power plants, also claim injury from the new coal plant provision. Without further detail, North American Coal Corporation ("NACCO") says that this provision "adversely affects" marketing of 100 MW of power from its subsidiary American Lignite Energy's proposed Coal-to-Liquids Plant (the "CTL Plant"). Pl. SJ. Br. 13.[5]

The CTL Plant was a joint venture of NACCO, Great River Energy, and Headwaters, Inc., but NACCO's SEC filings have never said a word about it. And after noting in its 2008 10-K (Ex. 2, p. 10) that "we believe that high capital costs necessitate government support for coal-to-liquids projects", Headwaters never again mentioned it in its SEC filings; although the CTL Plant was to be operating by "2012-2013" (Ex. 3). Headwaters instead reported *reducing* its spending on coal-to-liquids research in 2009, 2010, and 2011. (Ex. 4).

The CTL Plant's need for "government support" is understandable: only one such CTL facility exists anywhere in the world. (Ex. 5). Nevertheless, in 2006 plaintiff Industrial Commission of North Dakota ("NDIC") advanced $1.7 million for

[4] Plaintiffs cite a third PUC docket (No. 10-1188) involving new plant/MISO transactions as another example of NGEA injury, involving Great River Energy's Spiritwood plant. Pl. SJ Br. 14-16. However, plaintiffs do not cite any MDOC position in that proceeding, complaining *only about positions taken by environmental groups* (*Id*. at 15). As plaintiffs then concede, the PUC never decided this issue because "the Minnesota Legislature enacted an exemption to the NGEA for Spiritwood." *Id*. at 16.

[5] Plaintiffs' brief references a declaration by Carroll Dowling concerning the CTL Plant, but plaintiffs' counsel has confirmed that they did not file this document.

"preliminary studies" for the project (Ex. 6), and set an April 31, 2007 "go/no go" deadline for NACCO to either start on the initial, 3-year, $50 million "front end engineering and design process" study (Exhs. 7, 8), or pay back that $1.7 million. NDIC has since postponed that deadline five times, most recently to December 31, 2013. (Ex. 9). There is neither evidence nor reason to believe that the CTL Plant will ever be built.

Great Northern Properties also contemplates a new coal plant, South Heart (Pl. SJ Br. 14). In 2003 Great Northern proposed South Heart Version 1 as a conventional 500 MW coal-fired plant (Ex. 10, p. 31), but then abandoned that idea in 2006, replacing it with Version 2, a coal gasification plant. (Ex. 10, p. 32). In 2009, Great Northern ditched Version 2 and proposed Version 3, a 175 MW coal-to-hydrogen power plant (Ex. 10, p. 32) *that would be the first such plant in the world:* "there currently are no commercial demonstrations of these joint power and hydrogen plants", only "[c]onceptual plants [that] have been simulated using computer models to estimate technical and economic performance." (U.S. Department of Energy; http://energy.gov/fe/science-innovation/clean-coal-research/hydrogen-coal.) In 2009, when applying for federal support for this $2.2 billion project (which DOE denied), Great Northern said that Version 3 would be completed by September, 2016. (Ex. 10, p. 4). In 2010, when notifying the South Dakota PSC that Great Northern at some point would apply for a Certificate of Site Compatibility, it said that construction would not begin before July, 2013, and would take 4 years. (Ex.11). However, plaintiffs' counsel has confirmed that Version 3 will "likely" not start construction until *after 2015* (Ex. 12), and Great Northern has still not filed applications for the required Certificate, Clean Air Act

preconstruction permit, Clean Water Act Section 404 permit, etc. Since construction will not start before 2016, Great Northern's testimony (Kerr Decl. ¶5) that "in the event that the Next Generation [*sic*] were repealed or held unconstitutional, I believe the South Heart Project could be operational within four years", *i.e.*, by 2017, is simply not credible; rather, there is *no* evidence, credible or otherwise, that South Heart will ever be built.

PPA Provision Claims

Missouri River Energy Services ("MRES") says it has considered PPAs with two existing plants, Boswell 4 and Edgewater 5, but neither transaction closed "because of risks from the NGEA". Wahle Decl. ¶24. Further, MRES "cannot foresee . . . a power purchase agreement that MRES could enter into for over 50 MW over 5 years that would not be impacted by the NGEA." *Id.* ¶25.

Minnkota alleges that the PPA provision results in customers being "reluctant to enter into purchase agreements beyond 5 years because of the prohibitions imposed" (Pl. SJ Br. 13) and Basin says that its "planning has also been impeded by the NGEA's prohibitions on entering into new long-term power purchase agreements that would result in any carbon dioxide emissions." Pl. SJ Br. 12.

Plaintiffs fundamentally misunderstand the PPA provision. It *does not* prohibit PPAs that would result in emissions of "any" amount of CO_2. It prohibits PPAs o*nly if they would "increase" Minnesota's statewide CO_2 emissions.* As Basin concedes (Raatz Decl. ¶16) "it is unclear how one determines whether any particular import or transaction actually increases statewide power sector carbon dioxide emissions" until the PUC

determines what "increase" means. *No plaintiff has asked the PUC to do that in the six years since the NGEA was enacted.*

Nevertheless, even though the PPA provision was not at issue in either of these dockets, plaintiffs claim that because of "the interpretations of the statute by [MDOC] regarding Basin Electric's Dry Fork station and Dairyland's Weston 4 facility, the NGEA will need to be addressed every time MRES considers *any coal, gas, diesel, or biomass project*." Wahle Decl. ¶25 (emphasis added).

A. Plaintiffs Lack Article III Standing.

Article III requires that plaintiffs show an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms,* 130 S. Ct. 2743, 2752 (2010). "[T]hreatened injury must be *certainly impending* to constitute injury in fact,' and . . . '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1148 (2013), emphasis in original. Like plaintiffs in *Clapper* plaintiffs here rely on "a highly attenuated chain of possibilities, [that] does not satisfy the requirement that threatened injury must be certainly impending." At 1148.

Basin and MRES fear that in some future proceeding MDOC will repeat its positions as to the new coal plant provision/MISO transactions issue, that the PUC will agree with MDOC, and that Minnesota courts will uphold the PUC's decision. But that does not equate to a "reasonable apprehension" of *a future, adverse and affirmed PUC decision*, and no federal court has ever found standing in such circumstances. To the extent plaintiffs suggest that, in some future PUC docket, MDOC would ask the Attorney

General to bypass the PUC and seek an injunction based on MDOC's position, and that the Attorney General would do so, that scenario is far too speculative and implausible to support Article III standing.

"Injury" to the two alleged future plants is even more unlikely. Plaintiffs offer no evidence whatsoever as to the CTL Plant; Great Northern claims:

> Because of NGEA, it is likely that potential customers with Minnesota load will be unwilling to commit to power purchase or other types of participation agreements relative to the South Heart Project. This would be detrimental to the development and use of Great Northern Properties' coal resources as well as the development of the South Heart Project. Kerr Decl. ¶4.

Speculation that "it is likely" that "potential customers" would be "unwilling to commit" to South Heart power and that this "would be detrimental" to a project that – at best – would not be operational before 2020, and probably will never be built, is neither a "real" nor an "imminent" injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("conjectural or hypothetical" claims do not establish standing).

MRES' "injury" of having to consider the applicability of the new coal plant provision to a proposed plant (and one that was never built for reasons having nothing to do with the NGEA), is not injury within the meaning of Article III. Efforts expended in determining whether a statute applies to a plaintiff's activities is not "fairly … trace[able] to the challenged action of the defendant" (*Lujan*, 504 U.S. at 560), and any "harm" occasioned by such efforts is "'self-inflicted'". *See Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp*., 28 F.3d 1268, 1276 (D.C. Cir. 1994).

B. This Court Should Abstain From Deciding Plaintiffs' Claims.

Ironically, plaintiffs' claims necessarily depend upon this Court adopting what they insist is the *wrong* statutory interpretation, *i.e.*, that the new coal plant provision applies to MISO transactions. For this Court to undertake that interpretative task would violate basic principles of comity and constitutional avoidance; the Court should therefore abstain pursuant to *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941), until the PUC and Minnesota courts have determined whether and how the new coal plant provision applies to MISO transactions and what "increase" means in the PPA provision. Even more ironically, plaintiffs ask the court to assume what they themselves have the burden of proving, *i.e.*, that 'no set of circumstances exists under which the NGEA would be valid'. *TCF Nat. Bank v. Bernanke*, 643 F.3d 1158, 1163 (8th Cir. 2011) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), a rule that enforces "'the fundamental principle of judicial restraint.'" *Id*. (citing *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449–50 (2008)).

Pullman abstention is appropriate when "a state statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.'" *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 306 (1979) (citation omitted). Such abstention "avoid[s] unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Id.*. Consequently, where there is "doubt" as to "any . . . state-law issue that may be dispositive, federal courts should abstain under [*Pullman*]." *Va. Office for Protection & Advocacy v. Stewart,* 131 S. Ct.

1632, 1644 (2011) (Kennedy, J., concurring). This is true whether the issue is pending before a specific proceeding, as apparently in the Basin docket, or if the issue could be resolved in a future proceeding before any injury could occur.

Section 216H.03 is sufficiently ambiguous to warrant *Pullman* abstention – as plaintiffs themselves emphasize. Indeed, Basin describes the word "increase" in the PPA provision as one of its "problems" with the NGEA, because "[i]t is unclear how one determines whether any particular import or transaction actually increases statewide power sector carbon dioxide emissions". Raatz Decl. ¶16.

PUC rulings on whether and how the new coal plant provision applies to MISO transactions and what "increase" means in the PPA provision, will – at a minimum – "substantially modify" the questions before this Court. *Babbitt,* 442 U.S. at 306. The pending Basin proceedings or future PUC proceedings "will likely resolve the state-law questions underlying the federal claim," a circumstance under which abstention is "regularly ordered". *Harris Cnty Comm'rs Court v. Moore,* 420 U.S. 77, 83 (1975). This is the case whether the issue is constitutional or statutory preemption. *Time Warner Cable v. Doyle,* 66 F.3d 867, 884-5 (7th Cir. 1995) (citing *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 512 (1972)).

Because thus far the PUC has construed the NGEA to avoid imposing any burden on Plaintiffs, they will suffer no harm from abstention. *If* the PUC ever applies §216H.03 so as to affect the plaintiffs, they may return to this Court.

II. THE NGEA DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

A. The NGEA is Not "Extraterritorial".

Plaintiffs' principal Dormant Commerce Clause argument is that the NGEA is an "extraterritorial" regulation. Pl. SJ Br. 24-29. This version of extraterritoriality has no support in Dormant Commerce Clause precedent and, if accepted, would overturn entire well-settled categories of state regulation. Indeed, on the eve of this filing, the Ninth Circuit unanimously rejected an "extraterritoriality" challenge to California clean-fuels regulation indistinguishable from the challenge here. See *Rocky Mountain Farmers' Union v. Corey*, No. 12-15131, Slip Op. 58-68 (9th Cir. Sept. 18, 2013) (*RMFU*)(Appendix 1).

The Supreme Court has invalidated state laws under this doctrine just three times, all involving price control laws: *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Since, the Court rejected efforts to expand the "the reasoning in those cases" beyond "price control or price affirmation statutes." *Pharm. Research & Mfrs. of Amer. v. Walsh*, 538 U.S. 644, 669 (2003) ("*Walsh*"). "Accordingly, the [Supreme] Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie] the price of its in-state products to out-of-state prices.'" *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 2013 WL 4615131 *10 (9th Cir., Aug. 30, 2013) ("*AECOQ*") (citing *Walsh*, 538 U.S. at 669).

Even if the price control precedents applied here, the NGEA is not an "extraterritorial" regulation because it makes no attempt here to regulate commerce that "takes place wholly outside the State's borders." *Healy*, 491 U.S. at 336. It imposes no restrictions on commerce between out-of-state entities and *non-Minnesota* entities with whom they may wish to do business: any plant in 49 states can sell as much electricity, and under whatever terms, anywhere in the other 49 states. That alone is fatal to plaintiffs' arguments; *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793-94 (8th Cir. 1995) (rejecting out of state firm's extraterritoriality challenge to Minnesota statute prohibiting sales in Minnesota of petroleum-based sweeping compounds because statute did not preclude firm from "sell[ing] to out-of-state purchasers"); *RMFU*, Slip Op. at 61. Similarly, the NGEA does not prohibit out-of-state entities from selling power to purchasers in other states.[6]

The central premise of plaintiffs' extraterritorial argument is that "electricity is electricity," and that the NGEA impermissibly regulates "how the goods were manufactured, not the quality or character of the goods themselves." Pl. SJ Br. 25. This proposition has no support in Dormant Commerce Clause precedent; the Maine pharmaceuticals regulation in *Walsh*, 538 U.S. at 669, for example, regulated aspects of pharmaceuticals that do not manifest in the physical drugs. *RMFU*, Slip. Op. 58-68

[6] Plaintiffs' purely hypothetical "balkanization" scenario (Pl. SJ Br. 27-28) likewise does not warrant invalidating a state law. *See AECOQ*, 2013 WL 4615131 at *10 ("[T]he [Supreme] Court has never invalidated a state or local law under the dormant Commerce Clause based upon mere speculation about the possibility of conflicting legislation.")(citation and internal quotation marks omitted); *RMFU*, Slip Op. at 64-68).

(rejecting extraterritoriality challenge to regulation turning on carbon-intensity of fuels, wherever produced); s*ee also Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978); *AECOQ*, 2013 WL 4615131; *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 632-33 (6th Cir. 2010).

The radical and unprecedented character of what plaintiffs seek cannot be overemphasized: they are trying to turn the Dormant Commerce Clause into an extraordinary, unprecedented privilege allowing all out-of-state power generators to access a state's customers without adhering to regulatory requirements applicable to all in-state generation. As discussed further in connection with FPA preemption, (pp. 18-20) plaintiffs would eliminate states' longstanding powers, reflected in renewable portfolio standards and scores of other state laws, to distinguish among different types of power generation in regulating sales to in-state customers. Plaintiffs' ambitious new extraterritoriality theory would invalidate these along with the NGEA.

B. The NGEA Does Not Discriminate Against Interstate Commerce.

Plaintiffs' claim that the NGEA "expressly discriminates against electricity generated by coal," and that this amounts to unconstitutional discrimination because "Minnesota does not produce any coal to generate electricity." Pl. SJ Br. 30.

This argument is baseless. The NGEA's restrictions on new coal generation apply "evenhandedly." *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981); *Cotto Waxo*, 46 F.3d at 794. The NGEA regulates based upon carbon emissions, not geographic location. *See also RMFU*, Slip Op. 32-51 (rejecting discrimination challenges to regulation turning on carbon intensity without regard to origin).

The NGEA is entirely unlike the statute in *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 596 (7th Cir. 1995) (Pl. SJ Br. 30), which protected Illinois coal by discouraging use of *lower-sulfur* (less polluting) coal from western states with the obvious discriminatory intent "to eliminate western coal use by Illinois generating plants." The NGEA is not directed to protecting local industry; its goals of reducing greenhouse gas emissions and promoting renewable energy are non-protectionist.

Plaintiffs claim the NGEA "adversely affects the demand and use of out-of-state coal to generate electricity." Pl. SJ Br. 30. But "nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). *See also Exxon Corp.*, 437 U.S. at 125 (rejecting discrimination challenge to statute requiring oil companies to divest of gas stations even though "the burden of the divestiture requirements falls solely on interstate companies"). Moreover, the NGEA creates opportunities for lower-carbon power providers without regard to location. See *RMFU*, Slip Op. at 36 (noting benefits for out of state low carbon fuel providers).

Plaintiffs wrongly assert that the NGEA's exemptions discriminate against interstate commerce. It is exceptionally difficult to prove discrimination through such grandfathering, *see Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 727 (5th Cir. 2004) (a plaintiff "might succeed in raising an inference of discrimination, albeit a weak one, if it could show that [the statute] exempted all [in-state entities] but no out-of-state [entities]" in its grandfather clause). The NGEA exempts five facilities, all but one of

which had already begun construction or had vested interests in development before it was enacted, and two of which were located outside Minnesota. §216H.03, Subd. 5-7. These exemptions do not begin to meet the demanding standard for proving discrimination through grandfathering.

III. THE FEDERAL POWER ACT DOES NOT PREEMPT THE NGEA.

Plaintiffs assert that the Federal Power Act ("FPA"), which grants the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction over wholesale electricity rates, preempts the NGEA because the NGEA "impos[es] restrictions and conditions upon the interstate transmission and sale of electricity at wholesale." Pl. SJ Br. 39.

This fundamentally mischaracterizes the NGEA. Plaintiffs cite the new coal plant provision's "import or commit to import" language, but never address the fact that that phrase is modified by "statewide power sector carbon dioxide emissions," meaning that it applies only to power imported *and sold in Minnesota*. And *that* condition – regardless of any indirect impacts on FERC's jurisdiction -- is indisputably within the state's jurisdiction.

A state law that "impacts on matters within FERC's control" is not preempted so long as "the State's purpose [is] to regulate . . . subjects of state jurisdiction, and the means chosen [are] at least plausibly . . . related to matters of legitimate state concern." *Northwest Century Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 518 (1989). FERC agrees that states have authority over resource planning and procurement: "[FERC] will not affect or encroach upon state authority in such traditional areas as . . .

administration of integrated resource planning and utility buy-side and demand-side decisions . . . [and] *authority over utility generation and resource portfolios.*" FERC Order 888, 61 Fed. Reg. 21540, 21626, n.544; emphasis added.

State renewable portfolio standards ("RPS") are the perfect example of this authority, and more than 30 states – including Minnesota -- have RPS programs. By requiring utilities to sell designated amounts of renewable (*e.g.*, solar, wind) power, an RPS limits utilities' sales of fossil-fuel power. For purposes of FERC's jurisdiction, there is no functional difference between the RPS limits on utilities' overall fossil-fuel portfolio, and the NGEA's limits on a specific type of fossil fuel within that portfolio. Thus the NGEA's indirect impacts on wholesale rates could not be any greater than impacts from an RPS, which FERC agrees do not intrude on its jurisdiction:

> We acknowledge California's ability under its authorities over the electric utilities subject to its jurisdiction to favor particular generation technologies over others. We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways. . . . Under state authority, a state may choose to require a utility to construct generation capacity of a preferred technology or to purchase power from the supplier of a particular type of resource. *In re S. Cal. Edison Co.*, 70 FERC ¶61,215, 61,676 (1995).

FERC has repeatedly affirmed this position. *E.g.*, *Cal. PUC*, 134 F.E.R.C. ¶ 61,044, 61 (2011) (noting "the reality that states have the authority to dictate the generation resources from which utilities may procure electric energy," confirming that an "avoided cost rate may also reflect a state requirement that utilities purchase their energy needs from, for example, renewable resources."); *In re Midwest Power Systems, Inc.*, 78 FERC ¶61,067, 61,246 (1997)) ("We find that the Iowa [law] [is] consistent with

federal law to the extent that [it] requires electric utilities located in Iowa to purchase from certain types of generating facilities.").

Just like every RPS, the NGEA restricts sale of certain high-carbon power, and thus its effect on interstate transmission and wholesale sales is functionally indistinguishable from any RPS; for purposes of FERC jurisdiction there is no logical distinction between RPS limits on overall fossil-fuel power sales and NGEA's limits on specific types of that fossil-fuel power. Accordingly, the NGEA, like state Renewable Portfolio Standards, does not intrude on FERC jurisdiction.

IV. THE CLEAN AIR ACT DOES NOT PREEMPT THE NGEA

Contrary to Plaintiffs' arguments (Pl. SJ Br. 40-42), the Clean Air Act does not preempt the NGEA. When it addressed the Act's preemptive effect on state regulation relating to stationary sources, Congress affirmed that "nothing" in the Clean Air Act preempts "any requirement respecting control or abatement of air pollution" unless it is "less stringent" that applicable Clean Air Act standards. 42 U.S.C. § 7416. Compare 42 U.S.C. 7543(a) (*express* preemption of *mobile* source standards). Furthermore, the NGEA falls squarely within Minnesota's authority to regulate utilities serving Minnesota citizens and does not regulate carbon emissions in any way that implicates the Clean Air Act's regulatory regime or its preemptive scope. That such a law seeks to reduce air pollution – as do the dozens of state laws that direct utilities to procure clean energy, see *supra* – does not mean that it impairs in the slightest any provision or policy of the CAA. Plaintiffs' portrayal of the NGEA as a kind of extra jurisdictional emissions limitation is a mere repackaging, in ill-fitting Clean Air Act garb, of their misconceived

extraterritoriality argument under the Dormant Commerce Clause. See pp. 14, *supra* (noting that NGEA does not impair out-of-state sources' ability to sell electricity to buyers in 49 states).

Plaintiffs' novel contention is not supported by any precedent finding state clean energy laws preempted *by the Clean Air Act*. None of the recognized forms of preemption applies, *see* Defts. Mem. (30-31), and preemption of traditional state authority over public utilities would require a "clear and manifest" signal from Congress. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996). EPA itself– far from questioning the legitimacy of such laws – has encouraged states to rely on clean energy policies in meeting their air quality planning obligations.[7] State clean energy policies typically involve just what the NGEA does; they direct utilities to use, or not use, specified forms of power generation.

Finally EPA, the federal agency that administers the Clean Air Act – far from suggesting that such laws are in any tension with the Act -- has encouraged states to rely on clean energy policies in meeting air quality planning requirements under the Act.

In arguing for preemption, plaintiffs fundamentally misunderstand the CAA. With one exception (§7411, discussed below), every provision they reference involves the seven specific pollutants (carbon monoxide, lead, nitrogen dioxide, ozone, $PM_{2.5}$, PM_{10} and sulfur dioxide; (Ex. 13) for which EPA has promulgated National Ambient Air

[7] See Incorporating Energy Efficiency/Renewable Energy in State and Tribal Implementation Plans (http://www.epa.gov/airquality/eere/) and EERE Roadmap (2012) ((http://www.epa.gov/airquality/eere/pdfs/EEREmanual.pdf).

Quality Standards ("NAAQS"). *See, e.g.*, §7407(a) (state implementation plans "specify the manner in which … [NAAQS] will be achieved"); §7409 (procedure for EPA to establish NAAQS); §7410(a)(1) (procedure for states to submit implementation plans "after the promulgation of *a* [NAAQS]"); §7426(b) (petition process to request EPA finding that "sources emit or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(ii)[8] or this section"; in turn, §110(a)(2)(D)(i) requires states to prohibit emissions that "contribute significantly to nonattainment in . . . any other State with respect to any such [NAAQS]". But CO_2 is *not* a NAAQS pollutant, there are *no* ambient air quality standards for CO_2, and CO_2 is *not* regulated under any of these provisions.

That disposes of plaintiffs' reliance on *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2003) (Pl. SJ Br. 42, 43, 45), which held that state-law nuisance claims based on emissions of three NAAQS pollutants (sulfur dioxide, nitrogen dioxide and $PM_{2.5}$), were preempted by that very elaborate NAAQS regulatory regime (with assistance from the Act's Title IV sulfur dioxide cap-and-trade system). Likewise, *Clean Air Markets v. Pataki*, 338 F.3d 82 (2d Cir. 2003), struck down a state law that penalized emissions trades under the sulfur dioxide cap-and-trade system. None of these provisions apply to CO_2, nor do these cases involve a state's regulation of electricity procurement by utilities serving its citizens.

[8] §110(a)(2)(D)(ii) is a "scrivener's error"; the proper reference is to §110(a)(2)(D)(i). *Cooper*, 615 F.3d at 300, n. 1.

AEP v. Connecticut, 131 S. Ct. 2527 (2011), does not help plaintiffs either. The legal issue there was whether EPA's authority to regulate CO_2 was sufficient to displace *federal common-law claims,* not to preempt state law. The Court emphasized this critical difference: "Legislative displacement of federal common law does not require the same sort of evidence of a clear and manifest congressional purpose demanded for preemption of state law." *id.* at 2537. *See also* Gallisdorfer, *Clean Air Act Preemption of State Common Law*, 99 Va. L. Rev. 131, 139 (2013) ("*AEP* hardly compels—or even presages—a corresponding finding of preemption").[9]

EPA and states have CAA authority to regulate CO_2 emissions from power plants, and EPA is expected to propose CO_2 standards under §7411 for new power plants on September 20, 2013. But even after EPA adopts those standards, the Act expressly gives states authority to exceed these floor requirements and impose whatever more stringent standards. 42 U.S.C. §7416. Even where the Act expressly preempts state emission "standards or limitations" (42 U.S.C. §7543(a)), state and local energy policies encouraging use of alternative fuels are not preempted. *Association of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 542 (5th Cir. 2013). Like that Dallas fuel regulation, the NGEA affects generation choices for utilities that serve Minnesota customers and is not an emission standard implicating the Clean Air Act.

[9] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987), is equally inapplicable, involving preemption of common law claims when the defendant's discharges were affirmatively authorized by a Clean Water Act discharge permit.

V. CONCLUSION

The Court should deny plaintiffs', and grant defendants', motion for summary judgment.

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Respectfully submitted,

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