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. 11-3232 SRN/SER

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Next Generation Energy Act (NGEA) is a resource planning statute that regulates the manner in which utilities serving Minnesota meet the energy needs of Minnesota homes and businesses. It is a valid and non-discriminatory exercise of traditional state authority to ensure that Minnesotans have long-term access to affordable, reliable, and clean energy. Defendants' motion for summary judgment should be granted.

ARGUMENT

I. STATES HAVE TRADITIONAL AUTHORITY TO REGULATE THE ENERGY SOURCES USED TO MEET A STATE'S ENERGY NEEDS.

Electric utilities have traditionally been subject to extensive state regulation. *See, e.g., Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Com'n*, 461 U.S. 190, 206 n.17 (1983) (noting that "every state has a regulatory body with

authority for assuring adequate electric service at reasonable rates"); *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (stating that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"); *Southern Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503. 207 (8th Cir. 2002) (discussing the long history of state and local regulation of electric utilities). This traditional state authority extends to regulation of the energy sources relied on to meet the demand for electricity within a state. *See New York v. F.E.R.C.*, 535 U.S. 1, 24 (2002) (citing FERC Order No. 888, 61 FR 21540, 31,782, n. 543 (1996)) (noting the traditional state authority over resource planning).

Minnesota extensively regulates electric utilities, which includes both public utilities and electric cooperatives. A public utility is defined under Minnesota law as any entity that generates electricity or furnishes electric service, but does not include an electric cooperative. Minn. Stat. § 216B.02, subd. 4. An electric cooperative is an association that conducts business under a cooperative plan for purposes of furnishing electric service to its members. Minn. Stat. § 308A.010, subd. 2. A board of directors elected by the electric cooperative's customers is responsible for operating the cooperative. Minn. Stat. §§ 308A.301; 308A.635.

Public utilities and electric cooperatives are both subject to significant state regulation. For example, public utilities and electric cooperatives must provide electric service to customers in their assigned area (Minn. Stat. § 216B.39); must invest specific amounts of money in energy conservation projects (Minn. Stat. § 216B.241, subd. 1b);

are prohibited from disconnecting utility service during cold-weather months or during periods of extreme heat (Minn. Stat. § 216B.0975); and must comply with specific rules regarding the manner in which they collect payments from residential customers (Minn. Stat. § 216B.098). An electric cooperative also must file its resource plan with the Minnesota Public Utilities Commission (MPUC). Minn. Stat. § 216B.2422, subd. 2.[1]

In addition, both public utilities and electric cooperatives are required to comply with Minnesota's renewable portfolio standards. *See* Minn. Stat. § 216B.1691 (requiring electric utilities to generate or procure a certain percentage of the energy used to serve Minnesota customers through renewable sources). Renewable portfolio standards are an example of the traditional state authority to regulate the resources used to meet a state's energy demand. Over half the states in the nation have renewable portfolio standards.[2] Like a renewable portfolio standard, section 216H.03 is a resource planning statute that regulates the manner in which utilities serving Minnesota may meet the energy demands of Minnesota businesses and homes.[3]

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[1] The Minnesota Legislature has determined that the customers' role in electing the board of directors of an electric cooperative reduces the need for close regulation of the rates a cooperative charges its customers. As a result, the MPUC does not regulate an electric cooperative's rate-making decisions.

[2] Elizabeth Burleson, *Climate Change and Natural Gas Dynamic Governance*, 63 Case W. Res. L. Rev. 1217, 1251 (2013).

[3] The Seventh Circuit's recent decision in *Illinois Commerce Comm'n v. F.E.R.C.*, 721 F.3d 764 (7th Cir. 2013), noted in dicta that Michigan's RPS is likely invalid because
(Footnote Continued on Next Page)

II. SECTION 216H.03 REGULATES ONLY ENERGY OR CAPACITY THAT A UTILITY USES TO SERVE MINNESOTA HOMES AND BUSINESSES.

As outlined in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, section 216H.03, subdivision 3 applies only to the conduct described in subdivisions 3(1) through 3(3). Specifically, subdivision 3 restricts: (1) the construction of new coal-generating facilities in Minnesota; (2) reliance on electricity from a new coal-generating facility located outside Minnesota to meet Minnesota's in-state demand for electricity; and (3) new long-term power purchase agreements that increase Minnesota's reliance on carbon-emitting energy sources.[4] These restrictions involve only conduct by utilities serving Minnesota, and they are limited to the generating capacity or electricity used to meet Minnesota's energy demand.

III. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE.

Plaintiffs have the burden of establishing both standing and ripeness. *National Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 689 (8th Cir. 2003) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)). As outlined in Defendants'

(Footnote Continued From Previous Page)

it allows a utility to meet its renewable energy requirements only by using renewable energy generated in-state. As the court noted, "Michigan cannot, without violating the commerce clause . . ., discriminate against out-of-state renewable energy." *Id.* at 776. Implicit in this decision is a recognition that states may require the use of renewable energy resources, so long as the state does not distinguish between in-state and out-of-state sources.

[4] *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, at page 3 (Doc. No. 166).

Memorandum of Law in Support of Summary Judgment, standing and ripeness are lacking if a court must engage in "guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Intern. USA*, -- U.S. --, 133 S. Ct. 1138, 1150 (2013).[5]

Plaintiffs disagree with the policy judgments of the Minnesota Legislature, but they fail to show any concrete harm or other justiciable controversy that is ripe for adjudication. Plaintiffs cannot identify any specific lost business opportunity or sale resulting from the NGEA. Their claims rely on speculation about how section 216H.03 *might* apply in particular situations that may or may not occur. The NGEA has not yet been enforced against any Plaintiff, or any other entity.

IV. SECTION 216H.03 IS A VALID EXERCISE OF STATE AUTHORITY OVER RESOURCE PLANNING AND IS COMPLIANT WITH THE DORMANT COMMERCE CLAUSE.

Section 216H.03 evenhandedly furthers Minnesota's legitimate interest in having a long-term supply of reliable, affordable, and clean energy. The NGEA is a valid exercise of state authority over resource planning that is not discriminatory, unduly burdensome, or extraterritorial. As a result, section 216H.03 does not violate the dormant Commerce Clause.

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[5] *See* Defendants' Memorandum in Support of Summary Judgment, at pages 14-16 (Doc. No. 130).

A. Section 216H.03 Is Not An Extraterritorial Regulation.

The extraterritoriality doctrine limits state laws that directly control commerce occurring *wholly* outside the boundaries of a state. *Healy v. Beer Inst., Inc.*. 491 U.S. 324, 226 (1989). A regulation is not extraterritorial simply because it affects commerce in other states. *See Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (upholding statute even though it affected "Cotto Waxo's participation in interstate commerce" because the law "is indifferent to sales occurring out-of-state"). Instead, the extraterritoriality doctrine only precludes the "*direct or facial* regulation of wholly extraterritorial transactions[.]" *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 547 (7th Cir. 2003) (emphasis in original).

Section 216H.03 regulates only the manner in which Minnesota meets its energy demands. It does so by limiting the resources that utilities serving Minnesota may rely on to serve Minnesota homes and businesses. It does not limit energy or capacity transactions between out-of-state generators for consumption by out-of-state consumers. It regulates only utilities that serve Minnesota, and it regulates only energy or capacity used to meet Minnesota's energy needs. Section 216H.03 is a valid exercise of state authority and is not extraterritorial in reach.

B. Section 216H.03 Is Non-Discriminatory Because It Applies Evenhandedly To Interstate and Intrastate Interests.

A statute is non-discriminatory as long as it does not plainly provide "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." *Grand River Enter. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 942

(8th Cir. 2009), *cert. denied*, 559 U.S. 1068 (2010). Even when the burdens of a regulation fall solely on out-of-state entities due to the absence of comparable in-state interests, a regulation is still non-discriminatory if facially neutral and enacted for a non-discriminatory purpose. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 125 (1978) (rejecting the claim that a statute is discriminatory simply because its burdens fall solely on interstate companies); *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, -- F.3d --, 2013 WL 4615131, at * 7 (9th Cir. Aug. 30, 2013) (noting a statute that treats in-state and out-of-state interests the same is non-discriminatory "even when only out-of-state businesses are burdened because there are no comparable in-state businesses"). To constitute a discriminatory regulation, the effect of the law must be "powerful, acting as an embargo on interstate commerce without hindering intrastate sales." *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) *cert. denied*, 515 U.S. 1143 (1995).

In passing the NGEA, Minnesota exercised its traditional authority to regulate the energy sources that meet Minnesota's long-term demand for electricity. The statute applies evenhandedly to in-state and out-of-state interests. As outlined in Defendants' Memorandum of Law in Support of Summary Judgment, the Minnesota Legislature enacted section 216H.03 to limit Minnesota's long-term reliance on an energy source that

is subject to future uncertainty and carries significant environmental consequences.[6] Section 216H.03 furthers these goals by: (1) prohibiting construction of new coal facilities in Minnesota; (2) restricting reliance on electricity from new coal-fired facilities located elsewhere; and (3) restricting new power purchase agreements that increase statewide emissions, regardless of the location of the generating facility.[7]

Coal-fired electricity facilities take years to plan and develop. The exemptions contained in the statute apply evenhandedly and were designed to "grandfather" in reliance on projects that were already in the planning stages. *See Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 404 (3rd Cir. 1987) (noting that grandfather clauses "are common vehicles for avoiding hardship to those who have invested in reliance upon the prior law").[8] The exemptions benefit both in-state and out-of-state interests. As an example, the Dairyland MPUC docket resulted in a finding that reliance on electricity

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[6] *See* Defendants' Memorandum in Support of Summary Judgment, at pages 3-9 (Doc. No. 130).

[7] The definition of "statewide power sector carbon dioxide emissions" includes all emission associated with electricity relied on to meet Minnesota's demand for energy. Minn. Stat. § 216H.03, subd. 2. This includes electricity generated by both in-state and out-of-state facilities. Thus, Plaintiffs' suggestion that Clause (3) would apply disproportionately to the reliance on electricity generated out-of-state is incorrect.

[8] All of the exemptions except the offset provision and subdivision 7(3) apply only to projects that obtained regulatory permits or started construction by a specific date that preceded the date in which section 216H.03 took effect. Minn. Stat. § 216H.03, subds. 4-7. Subdivision 7(3) favors out-of-state interests by exempting only reliance on power purchase agreements for electricity from facilities located outside of Minnesota.

from a Wisconsin coal plant was exempt from the restrictions contained in section 216H.03.[9] Two of the other exempt projects cited by Plaintiffs in their Amended Complaint at ¶¶ 68-69 are located outside of Minnesota. Another of the exemptions, subdivision 7(3), actually favors out-of-state interests by applying to reliance on "a power purchase agreement between a Minnesota utility and a new large energy facility located outside Minnesota that . . . is essential to ensure the long-term reliability of Minnesota's electricity system[.]" The evenhanded nature of the exemptions, coupled with their goal of "grandfathering" in projects already under development, demonstrate the non-discriminatory purpose of the exemptions.

C. Section 216H.03 Confers Significant Local Benefits While Imposing Little To No Burden On Interstate Commerce.

A statute is valid under the *Pike* balancing test so long as any burden on interstate commerce is not clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970). A local benefit refers to any legitimate benefit to a state, not just those benefits that are "unique" to a state. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (upholding state statute regulating materials used for milk containers in part because of the substantial local benefits associated with energy conservation and easing solid waste disposal problems); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335-36

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[9] *See* Defendants' Memorandum in Support in Opposition to Plaintiffs' Motion for Summary Judgment, at pages 14-17 (Doc. No. 166).

(5th Cir. 2007), *cert. denied*, 550 U.S. 957 (2007) (recognizing that prevention of cruelty to animals was a legitimate local benefit conferred by statute that prohibited the sale of horsemeat as food for human consumption). The widespread nature of a problem does not minimize the local benefits conferred by a statute, nor does the dormant Commerce Clause preclude a state from addressing concerns that it has in common with other states. *See Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, -- F.3d --, 2013 WL 4615131, at *12 (holding that a ban on the sale of products produced by force feeding birds provides local benefits by "prevent[ing] complicity in a practice that [the legislature] deemed cruel to animals"). *Cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 522 (2007) (recognizing the mere fact that a problem is widely shared does not minimize a state's interest in addressing the issue).

The Minnesota Legislature reasonably determined that the NGEA would confer significant local benefits. *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981) (stating that "the Court will not second-guess legislative judgment about [a statute's] importance in comparison with related burdens on interstate commerce").[10] The legislative history contains ample testimony regarding both the environmental benefits of reduced reliance on coal-fired electricity, as well as the

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[10] *See also Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005) (stating that "under Pike, it is the *putative* local benefits that matter" and that "[i]t matters not whether these benefits actually come into being at the end of the day").

economic importance of preparing for future carbon regulations.[11] The Environmental Protection Agency's proposed standards for new power plants, which were announced on September 20, 2013, demonstrate the legitimacy of the policy judgment made by the Legislature to get ahead of future federal carbon regulations by enacting the NGEA.[12] As noted by Senator Ellen Anderson during a legislative hearing on the NGEA in February 2007, "[I]f we act now it will prevent us from making some very costly mistakes in the next decade that our rate payers will be paying the price for, for decades after CO2 regulations become enacted across the country." (Brown Aff., Ex. 3).[13]

The burden of the NGEA on interstate commerce is limited. Like renewable energy statutes and other resource planning laws, section 216H.03 simply limits Minnesota's reliance on coal-fired electricity to meet its long-term energy needs. It does not prevent the transmission of electricity through Minnesota or the generation of

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[11] *See* Defendants' Memorandum in Support of Summary Judgment, at pages 3-9 (Doc. No. 130).

[12] Press Release, Environmental Protection Agency, *EPA Proposes Carbon Standards For New Power Plants*, (Sept. 20, 2013), available at http://yosemite.epa.gov/opa /admpress.nsf/0/da9640577ceacd9f85257beb006cb2b6!OpenDocument. The proposed EPA rules would limit the amount of CO2 that a coal-fired facility could emit to 1,100 pounds of CO2 per megawatt-hour, *id.*, which is significantly less than the approximately 2,000 pounds of CO2 that the average coal-generating facility emits per megawatt-hour. *See* Arnold W. Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What are the Options*, 36 B.C. Envtl. Aff. L. Rev. 1, 33 (2009).

[13] Hearing on S.F. 145 and S.F. 192 before the Senate Energy, Utilities, Technology and Communication Committee, 85th Minn. Leg., Feb. 20, 2007, at pages 16-17 of the transcript (statement of Senator Ellen Anderson).

coal-fired electricity outside of Minnesota. The limited burden on interstate commerce is not "clearly excessive" in relation to the substantial local benefits conferred by section 216H.03. Therefore, the NGEA is a valid exercise of state authority that does not violate the dormant Commerce Clause.

V. THE NGEA IS A VALID EXERCISE OF STATE AUTHORITY AND IS CONSTITUTIONAL UNDER THE SUPREMACY CLAUSE.

A state is preempted from regulating a subject matter when: (1) federal law so comprehensively regulates the matter that Congress clearly intended to occupy the entire legislative field; or (2) there is an actual and direct conflict between state and federal law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 75 (2008). In areas of traditional state regulation, there is a strong presumption against preemption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

A. The NGEA Is Not Preempted By The Federal Power Act.

The Federal Power Act (FPA) regulates the "transmission of electricity in interstate commerce" and the "wholesale" sale of electricity. *See* 16 U.S.C. §§ 824(a), (b)1. With respect to the "wholesale" sale of electricity, the FPA regulates the seller of electricity and the rates charged. *California ex rel. Lockyer v. F.E.R.C.*, 383 F.3d 1006, 1011 (9th Cir. 2004), *cert. denied*, 551 U.S. 1140 (2007).

States retain plenary authority to regulate whether a utility should rely on a particular energy resource. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 385 (1988) (Scalia, J., concurring) (noting that FERC has authority over the reasonableness of a wholesale rate while states have authority to regulate the

purchaser's decision to purchase the electricity). As recognized by the Supreme Court, the FPA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co. v. Public Service Com'n of Ind.*, 332 U.S. 507, 517-18 (1947). FERC has stated that it "will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decision . . . authority over utility generation and resource portfolios." Order No. 888, 61 Fed. Reg. 21540, 21626, n.554 (1996).[14]

Plaintiffs fail to identify any specific provision of the FPA that is inconsistent with the NGEA. The NGEA regulates the manner in which utilities serving Minnesota may meet the energy demands of Minnesota businesses and individuals. It does not interfere with FERC's regulation of wholesale rates, and it imposes no requirements on the sellers of wholesale electricity.

The NGEA similarly does not regulate the interstate transmission of electricity. It does not regulate the terms under which electricity is transmitted. It does not dictate the

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[14] Plaintiffs suggest that there is no presumption against preemption of state regulation of public utilities and their resource planning decisions. It is well-established that there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). States have traditionally regulated utilities and their resource planning. *See, e.g., Pacific Gas*, 461 U.S. at 205. Thus, the presumption against preemption is plainly applicable.

manner in which electricity must be transmitted. It simply regulates the resources that utilities serving Minnesota may rely on to meet in-state energy demand. The NGEA is not preempted by the FPA.

B. The NGEA Is Not Preempted By The Clean Air Act.

Section 216H.03 does not regulate emissions. It does not establish, implement or enforce emissions standards. It imposes no requirements on any out-of-state generating facility. It does not restrict the amount of carbon a facility may emit. Instead, section 216H.03 is a resource planning statute that restricts utilities serving Minnesota from relying on certain energy sources to meet the electricity demands of Minnesota homes and businesses.

Plaintiffs suggest that because section 216H.02, subdivision 1 establishes a statewide goal for reducing carbon emissions, all provisions of the NGEA must be construed as an emissions regulation.[15] Just as 29 states have renewable energy portfolio standards, section 216H.03 regulates only the energy sources that utilities serving Minnesota may rely on to meet Minnesota's energy demand. Nothing in section 216H.03 imposes any requirements with respect to emissions on any facility located outside of Minnesota. The Clean Air Act does not conflict with or otherwise prevent states from exercising their traditional authority to regulate the resources used to meet in-state energy demands. Therefore, the NGEA is not preempted by the Clean Air Act.

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[15] *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, at page 44 (Doc. No. 171).

CONCLUSION

For all the reasons discussed above, the State Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.

Dated: October 10, 2013

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