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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Next Generation Energy Act ("NGEA") is a resource planning statute that regulates the energy sources upon which Minnesota utilities rely when powering Minnesota homes and businesses. The NGEA is a valid exercise of the State's lawful and traditional authority to ensure that utilities serving Minnesota rely on energy sources that are reliable, affordable, and in the public interest. Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

FACTS

I. STATES EXTENSIVELY REGULATE THE ENERGY RESOURCES ON WHICH PUBLIC UTILITIES RELY TO MEET CUSTOMER DEMAND FOR ELECTRICITY.

In Minnesota and many other states, an electric utility is granted the exclusive right to provide electric service to customers within specified geographic service areas.

See Minn. Stat. §§ 216B.37; 216B.40; (Hempling Aff., Ex. 2).[1] In exchange for this monopoly, utilities have a legal obligation to "furnish safe, adequate, efficient and reasonable service" to customers in their assigned service area. Minn. Stat. § 216B.04; (Hempling Aff., Ex. 2).[2] Because of the vital role of electricity, utilities are subject to extensive state regulation to ensure a continuous and affordable supply of energy. (*Id.*).[3]

The law in many states, including Minnesota, provides for regulatory review of a utility's resource planning. (*Id.*).[4] Resource planning involves a utility's acquisition of the capacity to continuously generate an adequate amount of electricity to meet customer demand. (*Id.*).[5] Utilities typically meet their resource planning obligations through ownership of electric-generation facilities or by contracting to purchase another entity's generation capacity. (*Id.*).[6] The Minnesota Public Utilities Commission ("MPUC") reviews resource plans of utilities serving Minnesota to ensure that the energy resources relied on are adequate and in the public interest. *See* Minn. Stat. § 216B.2422, subd. 2.

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[1] Expert Report of Scott Hempling, ¶ 34; Minn. Stat. § 216B.01 (providing that it is "in the public interest that public utilities be regulated").

[2] Expert Report of Scott Hempling, ¶ 34.

[3] Expert Report of Scott Hempling, ¶26.

[4] Expert Report of Scott Hempling, ¶ 26.

[5] Expert Report of Scott Hempling, ¶¶ 24-25.

[6] Expert Report of Scott Hempling, ¶ 39.

The MPUC also regulates many other aspects of a utility's provision of electric service. *See, e.g.,* Defs' Mem. Supp. Summ. J. 2.

II. THE NGEA IS A RESOURCE PLANNING STATUTE THAT LIMITS RELIANCE ON COAL-FIRED GENERATION SOURCES.

Section 216H.03 is a resource planning statute that falls under the State's traditional authority to regulate electric utilities. Section 216H.03, subdivision 3 has three clauses. Clause (1) prohibits construction of new coal-fired facilities in Minnesota after 2007. That prohibition means that Minnesota utilities can no longer rely on energy from new coal-fired facilities in Minnesota. Clause (2) prohibits a Minnesota utility from importing or committing to import power into the state from new coal-fired facilities built elsewhere after 2007. Clause (3) prohibits Minnesota utilities from entering into long-term agreements to purchase coal-fired power after 2007. Subdivision 4 provides for an exception if a party demonstrates to the MPUC that it will offset new carbon dioxide contributions.

III. THE FEDERAL GOVERNMENT HAS RESERVED TO THE STATES THE AUTHORITY TO REGULATE UTILITY RESOURCE PLANNING, RESOURCE PORTFOLIOS, AND UTILITY BUY-SIDE DECISIONS—THE PRECISE TOPICS REGULATED BY THE NGEA.

States and the federal government play important—and compatible—roles in the regulation of electric service.

The Federal Power Act grants the federal government authority over "transmission of electricity in interstate commerce" and "wholesale" sales of electricity. 16 U.S.C. § 824(a),(b)(1). The Federal Energy Regulatory Commission ("FERC") administers the FPA. FERC regulates wholesale electricity rates, approves transmission line projects, and sets transmission rates. 16 U.S.C. § 824.

FERC recognizes that states retain their traditional regulatory authority over electricity. FERC Order 888 states that FERC:

> [W]ill 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, including DSM [demand-side management]; authority over utility generation and resource portfolios…

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, 61 FR 21540, 21626, n. 544 (May 10, 1996).

In 1999, FERC encouraged the creation of regional transmission organizations, or RTOs. *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285 (Dec. 20, 1999). In the United States, a series of regional transmission organizations are responsible for operating the electric transmission system, or power grid, within their particular geographic region. (Blumsack Aff., Ex. 2).[7] The Midcontinent Independent System Operator ("MISO") is the regional transmission organization that serves Minnesota, North Dakota, and 14 other states in the Midwest region, as well as the Canadian province of Manitoba. (*Id.*).[8]

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[7] Expert Report of Seth Blumsack ¶ 9.

[8] Expert Report of Seth Blumsack ¶ 9.

A primary function of MISO is to help ensure the reliable operation of the transmission system. (*Id.*).[9] This requires MSIO, among other things, to help ensure that the amount of electricity being produced and consumed at any given time are equal and to help ensure that sufficient resources are available in the event of an outage or other problem. (Hempling Aff., Ex. 2).[10] To achieve a continuous and cost-effective balance between supply and demand for electricity, MISO operates short-term energy markets, often referred to as "organized energy markets." (*Id.*).[11] In these short-term markets, a generator of electricity is required to notify MISO, usually one day in advance, of the amount of electricity it can generate for each hour of the following day and the price it would accept. (Hempling Aff., Ex. 2; Blumsack Aff., Ex. 2).[12] At the same time, utilities notify MISO of the quantity of energy they need to meet customer demand for each hour of the next day. (*Id.*).[13] With this information, MISO selects the lowest cost generating facilities for each hour and directs those facilities to generate electricity. (Hempling Aff., Ex. 2).[14] Those facilities then generate electricity and place it into the transmission

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[9] Expert Report of Seth Blumsack ¶ 9.

[10] Expert Report of Scott Hempling ¶ 44.

[11] Expert Report of Scott Hempling, ¶¶ 23, 46.

[12] Expert Report of Scott Hempling, ¶ 46; Expert Report of Seth Blumsack,¶ 22.

[13] Expert Report of Scott Hempling, ¶ 46; Expert Report of Seth Blumsack, ¶ 21-23.

[14] Expert Report of Scott Hempling, ¶ 46.

system, where it is used by purchasing utilities to meet customer demand. (Hempling Aff., Ex. 2; Blumsack Aff., Ex. 2).[15] Electricity in the MISO transmission system may be generated from a variety of energy sources, such as wind, coal, nuclear or hydro. (Hempling Aff., Ex. 2).[16] At any time, the mix of electrons flowing in the transmission network, and into and out of each state, will be the mix of electrons produced by the generation sources selected in the MISO energy markets. (*Id.*).[17]

MISO requires utilities to demonstrate legal control--through ownership of generation facilities or contracting for another facility's generating capacity--of an amount of capacity sufficient to meet anticipated customer demand. (*Id.*).[18] MISO, when conducting its planning, must consider state energy policy objectives, including state laws mandating use of renewable energy sources and statutes that reduce dependence on emissions-creating generation. (*Id.*).[19] For example, approximately 29 states have renewable energy standards requiring that utilities meet a certain percentage of their energy usage from renewable sources of energy. *See* Elizabeth Burleson, *Climate*

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[15] Expert Report of Scott Hempling, ¶¶ 19, 46; Expert Report of Seth Blumsack ¶ 22.

[16] Expert Report of Scott Hempling, ¶¶ 55, 80-82.

[17] Expert Report of Scott Hempling, ¶¶ 55, 80-82.

[18] Expert Report of Scott Hempling, ¶ 26.

[19] Expert Report of Scott Hempling, ¶ 50; *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011).

Change and Natural Gas Dynamic Governance, 63 Case W. Res. L. Rev. 1217, 1251 (2013). Like the NGEA, these types of state regulations are allowed under the FPA, and MISO considers them when carrying out its planning and coordination activities, regarding the transmission system.

The NGEA limits the ability of a Minnesota utility to construct a coal plant in Minnesota after 2007 or to contract for energy produced from a coal plant constructed after 2007, regardless of its location. This in no way disrupts MISO. (Hempling Aff., Ex. 2).[20] Clause (3) restricts only long-term power purchase agreements, defined as "an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years." Minn. Stat. § 216H.03, subd. 3(3). Sales in the MISO energy market are for short-term energy and involve far less than 50 megawatts of electricity. (Hempling Aff., Ex. 2).[21] Thus, clause (3) does not apply to the MISO energy markets. Clause (2) prohibits for consumption in Minnesota the "import or commit[ment] to import" power "from a new large energy facility" outside of Minnesota. In the MISO energy markets, a buyer is simply purchasing electricity from a pool of electrons in the transmission system. (Hempling Aff., Ex. 2).[22] The buyer does not know the physical source of electrons purchased, and therefore the buyer does not "import or commit to import" power from a

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[20] Expert Report of Scott Hempling, ¶ 80.

[21] Expert Report of Scott Hempling, ¶ 79.

[22] Expert Report of Scott Hempling, ¶¶ 79, 81.

"new large energy facility" through the MISO energy markets. (*Id.*).[23] It would be impossible to apply clause (2) to the MISO energy market. *See* Minn. Stat. 645.17 (1) (providing that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable"). Instead, this provision applies to the agreement that the Minnesota entity makes outside of the MISO market regarding the relevant power. Nothing in the NGEA requires MISO to reconfigure the transmission grid to ensure that power from an electricity generator in another state would not enter Minnesota. (Hempling Aff., Ex. 2).[24]

IV. PLAINTIFFS MISCONSTRUE THE MINNESOTA PUBLIC UTILITIES COMMISSION DOCKET PROCEEDINGS IN CLAIMING THE DOCKETS REFLECT THE MANNER IN WHICH MINN. STAT. §216H.03 COULD APPLY TO OUT-OF-STATE ACTORS AND ACTIONS.

A. The Role of the Minnesota Public Utilities Commission.

As previously discussed, the MPUC is responsible for conducting resource planning proceedings to ensure the energy resources relied upon by utilities serving Minnesota are adequate and consistent with the public interest. *See* Minn. R. 7843.0500 (outlining process for review of resource plans submitted by utilities that serve Minnesota). The MPUC considers the NGEA as part of resource planning proceedings. 2013 Minn. Laws, ch. 132 § 3 (to be codified at Minn. Stat. § 216B.2422, subd. 4). The

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[23] Expert Report of Scott Hempling, ¶ 53.

[24] Expert Report of Scott Hempling, ¶ 82.

Minnesota Department of Commerce ("MDOC") serves as an advocate for the interests of ratepayers in MPUC proceedings. *See* Minn. Stat. § 216C.09(b).

Since being passed in 2007, three MPUC proceedings have presented issues concerning the application of section 216H.03.

1. Great River Energy Proceeding.

Great River Energy (GRE), which is not a party to this case, voluntarily requested that the MPUC grant an exemption from section 216H.03 for electricity from the Spiritwood Station. (Everson Aff., Ex. 1).[25] While the matter was pending before the MPUC, the Minnesota Legislature enacted such a statutory exemption. 2011 Minn. Laws, ch. 97, § 30 (codified at Minn. Stat. § 216H.03). The facts are as follows:

In July 2008, Great River Energy (GRE) filed a resource plan with the MPUC. (Everson Aff., Ex. 2).[26] After a utility files its resource plan, interested persons may submit comments regarding the resource plan. *See* Minn. R. 7843.0300, subp. 10. In November 2009, several environmental organizations jointly submitted comments in

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[25] Great River Energy's Notice of Changed Circumstances and Petition for Approval of Offsets, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Aug. 2, 2010).

[26] Great River Energy's Initial Filing – 2008 Resource Plan, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (July 1, 2008).

which they argued that GRE's reliance on generation capacity from Spiritwood Station, a North Dakota power plant, may violate the NGEA. (Everson Aff., Ex. 3).[27]

GRE filed reply comments arguing that section 216H.03 applied only if a utility relied on more than 50 MW of generation capacity from a facility, even if the facility could produce in excess of 50 MW of energy. (Everson Aff., Ex. 4).[28] Because GRE intended to rely on Spiritwood for less than 50 MW of capacity, GRE argued that section 216H.03 did not apply. (*Id.*). The environmental groups, on the other hand, argued that section 216H.03 applied to energy from any facility that was capable of producing more than 50 MW of energy. (Everson Aff., Ex. 3).[29] Given the dispute about how to interpret the NGEA, the MDOC filed comments recommending that the MPUC "invite legal briefs" regarding the appropriate legal interpretation of section 216H.03.

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[27] Petition to Intervene and Comments of Izaak Walton League of America, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Nov. 3, 2009), at page 3 of the Petition.

[28] GRE Reply Comments, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Dec. 3, 2009), at page 4-5, 11-12 of the Comments.

[29] Petition to Intervene and Comments of Izaak Walton League of America, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Nov. 3, 2009), at page 4 of the Petition.

(Everson Aff., Ex. 5).[30] One week later, the MPUC issued a notice seeking legal briefs. (Everson Aff., Ex. 6).[31]

During the briefing period, the MDOC filed comments suggesting that Spiritwood may qualify for an exemption under section 216H.03, subdivision 7, which exempts reliance on electricity from a facility if necessary to: (1) ensure the long-term reliability of Minnesota's electric system; or (2) avoid placing a substantial financial burden on Minnesota ratepayers. (Everson Aff., Ex. 7).[32] In response, GRE submitted supplemental comments in which it stated for the first time that it would be "filing a proposal for offsets by May 1, 2010 and is evaluating the [MDOC's] recommendations to seek an exemption." (Everson Aff., Ex. 8).[33] *See* Minn. Stat. § 216H.03, subd. 4(b) (defining offset as a reduction in carbon emissions accomplished by reducing an existing facility's emissions or purchasing allowances from an established cap-and-trade system).

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[30] Reply Comments of the Minnesota Office of Energy Security, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Dec. 3, 2009), at page 1-2 of the Comments.

[31] Notice Seeking Legal Briefs issued by the MPUC, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Dec. 11, 2009).

[32] MDOC's Response to the Notice for Comments, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Feb. 1, 2010), at page 7-8 of the Response.

[33] Great River Energy's Supplemental Reply Comments, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Mar. 1, 2010), at page 1 of the Comments.

After several extensions, GRE filed a notice of changed circumstances and petition for approval of offsets in August 2010. (Everson Aff., Ex. 1).[34] Noting that the "current severe recession" had changed "GRE's members' needs for the foreseeable future," GRE stated that its proposed offsets exceeded any emissions that would result from generation of power to meet GRE's members' needs. (*Id.*).[35] As is standard practice, the MPUC issued a notice seeking comments on GRE's petition for approval of offsets. (Everson Aff., Ex. 9).[36]

The MDOC submitted comments on September 16, 2010, in which it suggested that the MPUC consider whether an exemption applied to reliance on capacity from Spiritwood, partly because consideration of GRE's offset proposal would involve considerable resources. (Everson Aff., Ex. 10).[37] GRE responded by requesting that the

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[34] Great River Energy's Notice of Changed Circumstances and Petition for Approval of Offsets, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Aug. 2, 2010).

[35] Great River Energy's Notice of Changed Circumstances and Petition for Approval of Offsets, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Aug. 2, 2010), at pages 1-2 of the Notice and Petition.

[36] Notice Seeking Comments issued by the MPUC, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Aug. 2, 2010).

[37] Comments of the Office of Energy Security, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Sept. 16, 2010), at page 2 of the Comments.

MPUC accept its proposed 2008 resource plan and grant additional time as needed "to evaluate GRE's proposed offset projects." (Everson Aff., Ex. 11).[38]

As requested by GRE, the MPUC accepted GRE's resource plan and referred its offset proposal to a separate docket for consideration. (Everson Aff., Ex. 12).[39] While the issue of GRE's offsets was pending, the Minnesota Legislature enacted a provision that exempted an entity's reliance on electricity from a new large energy facility that meets certain regulatory requirements and "on which construction began before July 1, 2008." 2011 Minn. Laws, ch. 97, § 30. Because this exemption applied to reliance on energy from Spiritwood, GRE withdrew its request for approval of offsets, and the MPUC closed its docket. (Everson Aff., Ex. 13).[40]

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[38] Great River Energy's Reply Comments, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Sept. 30, 2010), at page 7 of the Comments.

[39] MPUC's Order Accepting Resource Plan, Referring Carbon Offset Issues to Separate Docket, and Setting Future Filing Requirements, *Matter of Great River Energy 2008 Integrated Resource Plan*, MPUC Docket No. ET2/RP-08-784 (Dec. 3, 2010), at pages 3-4 of the Order.

[40] Letter from GRE, *Matter of Great River Energy's Proposed Carbon Offset Plan pursuant to Minnesota Statutes § 216H.03*, MPUC Docket No. ET2/M-10-1188 (June 1, 2011).

2. Dairyland Proceedings.

Dairyland Power, which is not a party to this action, received an exemption from the MPUC under section 216H.03 for its reliance on electricity from the Weston 4 facility. The facts of this proceeding are as follows:

On September 9, 2011, Dairyland filed its 2011-2026 resource plan with the MPUC. (Everson Aff., Ex. 14).[41] As is standard practice, the MPUC issued a notice inviting comments on the proposed resource plan. (*Id.*).[42] On October 10, 2011, several environmental organizations jointly submitted comments suggesting that Dairyland's resource plan was incomplete for failing to address the applicability of section 216H.03 to Weston 4, a coal-fired facility located in Wisconsin that may serve Minnesota customers. (Everson Aff., Ex. 15).[43] In response, Dairyland asserted that the NGEA did not apply to it because it had recently joined MISO:

> Dairyland became a MISO Transmission Owner effective June 1, 2010. As a result, Dairyland no longer dispatches its portion of Weston 4 to match Dairyland load commitments. Rather, Dairyland's share of Weston 4 is

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[41] MPUC's Notice Seeking Comments, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Sept. 19, 2011).

[42] MPUC's Notice Seeking Comments, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Sept. 19, 2011).

[43] Letter Containing the Izaak Walton League of America's Comments, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Oct. 10, 2011).

> dispatched by MISO to meet MISO's requirements, independent of service by Dairyland of Dairyland's load.

(Everson Aff., Ex. 16).[44] In other words, even though Dairyland was obligated to have capacity to meet the demands of its Minnesota customers, Dairyland argued that the NGEA did not apply because MISO made the ultimate determination of which facilities would physically produce energy. Responding to Dairyland's assertion that the NGEA could never apply to a member of MISO, the MDOC pointed out Dairyland's continued obligation to engage in resource planning and otherwise comply with Minnesota law when serving Minnesota consumers:

> Dairyland clearly has the responsibility to ensure that it has adequate resources to meet the needs of its member-distribution cooperatives. In fact, a main subject of this proceeding is whether Dairyland has obtained adequate resources to meet the needs of its member cooperatives. That responsibility does not disappear simply due to the existence of MISO. Likewise, the responsibility to comply with Minnesota statutes does not fall to MISO; that is Dairyland's responsibility.

(Everson Aff., Ex. 17).[45] Thus, the MDOC recognized that Dairyland, when serving its Minnesota customers, had resource planning obligations under Minnesota law, including an obligation to comply with section 216H.03. The MDOC then addressed the assertion

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[44] Reply Comments of Dairyland Power Cooperative on Completeness, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Oct. 26, 2011), at page 5 of the Comments.

[45] Public Comments of the MDOC, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Mar. 8, 2012), at page 27 of the Comments.

that section 216H.03 does not apply to Dairyland because generation dispatched by MISO is not assigned to any particular user:

> Dairyland's argument that no generation dispatched by MISO can be assigned to any utility specific load is not entirely accurate. It is true that electrons can and do travel in many different directions under different physical circumstances, such that it is impossible to determine which electrons from which generation units reached which end-use customers. Likewise, it is impossible to determine that no electrons from a generation unit reach a particular end-use customer, unless the generation resource and end-use customer are completely disconnected from each other physically. However, within the MISO energy market, each utility's resources are offset against load so a utility's total supply of power is compared to the total demand for power. Any utility that does not have sufficient resources to meet the demand for power on its system must purchase more energy from the market to meet the needs of the load fully. Thus, all of a utility's resources are matched to all of a utility's load, regardless of state boundaries. Any surplus energy is sold to other entities while any shortage results in the utility purchasing energy from the market at the prevailing price.

(*Id.*).[46]

The MDOC's comment simply explains that Minnesota resource planning obligations remain in effect, even if the utility serving Minnesota homes and businesses participates in the MISO markets. The MDOC expressly stated that at that time it was "not reach[ing] a conclusion as to whether and how Minn. Stat. § 216H.03 applies to

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[46] Public Comments of the MDOC, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Mar. 8, 2012), at page 28 of the Comments.

Weston 4." (*Id.*).[47] Instead, the MDOC recommended that Dairyland indicate in reply comments whether it believed an exception to section 216H.03 applies to Weston 4. (*Id.*).[48]

Consistent with the MDOC's recommendations, Dairyland submitted comments establishing that it qualified for an exemption under section 216H.03, subd. 7(1), which applied to reliance on electricity from a facility for which a proposal or application was filed with the MPUC before April 1, 2007. (Everson Aff., Ex. 18).[49] The MDOC responded to Dairyland's comment by recommending that the MPUC find the exemption applicable to reliance on electricity from Weston 4. (Everson Aff., Ex. 19).[50] On March 24, 2012, the MPUC found the exemption applied to Weston 4. (Everson Aff., Ex. 20).[51]

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[47] Public Comments of the MDOC, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Mar. 8, 2012), at page 30 of the Comments.

[48] Public Comments of the MDOC, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Mar. 8, 2012), at page 30 of the Comments.

[49] Reply Comments of Dairyland, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (May 8, 2012), at page 17 of the Comments.

[50] MDOC's Supplemental Comments, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (June 8, 2012), at pages 7 and 9 of the Comments.

[51] MPUC Order Accepting Resource Plan and Establishing Filing Requirements, *Matter of Dairyland Power Cooperative's Integrated Resource Plan 2011-2026*, MPUC Docket No. ET-3/RP-11-918 (Oct. 24, 2012), at pages 6-8 of the Order.

3. Basin Electric Proceeding.

In this resource planning proceeding, Basin Electric on its own initiative questioned whether certain power transfers might violate the NGEA. Basin then asked the MPUC to defer ruling on the issue because of this lawsuit. As a result, the MPUC issued no decision on the issue, nor was a decision necessary because the MPUC had already accepted Basin's resource plan. The facts are as follows:

Basin Electric filed its resource plan with the MPUC in July 2008. (Everson Aff., Ex. 21).[52] In its resource plan, Basin Electric disclosed the construction of the Dry Fork generation facility, a coal-fired facility under construction near Gillette, Wyoming. (*Id.*).[53] It also indicated that Basin may transfer power from the Western Interconnection, which serves the western United States, into the Eastern Interconnection, which serves the eastern United States, including North Dakota and Minnesota. (*Id.*).[54] The MPUC approved of and accepted Basin's resource plan and ordered that Basin file its next

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[52] Basin Electric's 2008 Integrated Resource Plan for the years 2006-2012, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (July 18, 2008).

[53] Basin Electric's 2008 Integrated Resource Plan for the years 2006-2012, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (July 18, 2008), at pages 1, 3, 28-29, 36, and 60 of the Integrated Resource Plan.

[54] Basin Electric's 2008 Integrated Resource Plan for the years 2006-2012, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (July 18, 2008), at, *e.g.*, pages 33-35 of the Integrated Resource Plan.

resource plan by January 1, 2012. (Everson Aff., Ex. 22).[55] There were no issues raised regarding Basin's compliance with section 216H.03.

On October 10, 2011, Basin filed a notice of changed circumstances affecting its resource plan. (Everson Aff., Ex. 23).[56] The notice indicated that Basin was considering joining MISO and requested a one-year extension for filing its next resource plan. (*Id.*).[57] In its notice, Basin raised the issue of whether its transfers of electricity from the Western to Eastern interconnection might violate section 216H.03:

> As a result of these transfers, it is possible to argue that theoretically, a portion of [Dry Fork's] power delivered to the Eastern Interconnection to serve the new load in North Dakota, might end up serving Basin Electric's members in Minnesota. [The NGEA] could be interpreted to condition or prohibit the above described transfers necessary for Basin Electric to serve its members. The granting of an additional year to complete the next [resource plan] will also provide an opportunity for an examination of the issues surrounding this changed circumstance.

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[55] MPUC Order Accepting Plan, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Feb. 11, 2010).

[56] Basin Electric's Notice of Changed Circumstances, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Oct. 10, 2011).

[57] Basin Electric's Notice of Changed Circumstances, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Oct. 10, 2011), at pages 1-2 of the Notice.

(*Id.*).[58] As is normal practice when receiving a notice of changed circumstances, the MPUC invited comments on Basin's notice. (Everson Aff., Ex. 24).[59]

The MDOC responded by suggesting that, rather than waiting one year to examine the applicability of section 216H.03, the MPUC should order immediate briefing on the issue. (Everson Aff., Ex. 25).[60] By letter dated November 28, 2011, Basin agreed with the MDOC's recommendation and indicated that it would file "an analysis on the Dry Fork Station as related to Minnesota Statute 216H.03." (Everson Aff., Ex. 26).[61] On December 23, 2011, the MPUC granted Basin's request to extend the due date for its next resource plan to January 1, 2013 and also "accept[ed] Basin's agreement to file an analysis of the applicability of Minn. Stat. § 216H.03 to the Dry Fork Station no later than February 1, 2012." (Everson Aff., Ex. 27).[62]

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[58] Basin Electric's Notice of Changed Circumstances, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Oct. 10, 2011), at page 2 of the Notice.

[59] MPUC's Notice Seeking Comments, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Oct. 24, 2011).

[60] MDOC's Comments, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Nov. 10, 2011).

[61] Basin Electric's Response for the Notice of Changed Circumstances, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Nov. 28, 2011).

[62] MPUC's Order Extending Due Date for Next Resource Plan Filing, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Dec. 23, 2011).

On January 18, 2012, Basin Electric filed a letter with the MPUC in which it stated that "[s]ince the constitutionality of the Next Generation Energy Act 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." (Everson Aff., Ex. 28).[63] Basin also argued that no legal interpretation of section 216H.03 was necessary because it was highly unlikely that electricity generated at Dry Fork would end up in Minnesota. (*Id.*).[64] The MDOC responded by suggesting that the MPUC require Basin to provide information regarding where capacity from Dry Fork is registered to meet demand energy, *i.e.*, "whether all the capacity of Dry Fork Station is registered to meet reserve requirements in the Western Interconnection." (Everson Aff., Ex. 29).[65] The MPUC took no further action on this issue, in part because the MPUC had already accepted Basin's resource plan and further action was unnecessary.

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[63] Basin Electric's Reply Comments, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Jan. 18, 2012), at page 3 of the Comments.

[64] Basin Electric's Reply Comments, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Jan. 18, 2012), at page 2 of the Comments.

[65] MDOC's Comments, *Matter of Basin Electric Power Cooperative's 2008 Integrated Resource Plan*, MPUC Docket No. ET6125/RP-08-846 (Feb. 21, 2012).

LEGAL ARGUMENT

The NGEA is a valid exercise of state authority to regulate the energy resources relied on to serve Minnesota businesses and customers. Section 216H.03 is constitutional under both the Commerce Clause and Supremacy Clause. In the interests of judicial economy, Defendants refer the Court to the law contained in Defendants' Memorandum of Law in Support of Summary Judgment.

I. THE NGEA IS CONSTITUTIONAL UNDER THE DORMANT COMMERCE CLAUSE.

The Minnesota Legislature has directed that Minnesota rely less on power produced from coal. The Legislature did so to promote a stable future supply of reliable, affordable energy and to promote clean energy as a means of furthering environmental and public health interests. To the Plaintiffs, the NGEA may be a financial disappointment. But the dormant Commerce Clause does not protect against financial disappointment. The NGEA is not discriminatory, unduly burdensome, or extraterritorial and therefore does not run afoul of the dormant Commerce Clause.

A. The NGEA Is Non-Discriminatory.

A law is discriminatory when it provides significantly favorable treatment to in-state actors at the expense of out-of-state interests. *Department of Rev. of Ky. v. Davis*, 553 U.S. 328, 336-37 (2008). When read as a whole, section 216H.03 applies equally to in-state and out-of-state interests. Clause (1) prohibits the construction of new coal-fired facilities within Minnesota, thus ensuring that Minnesota does not rely upon electricity from new in-state coal facilities. Clause (2) restricts in-state reliance on new coal facilities located outside of Minnesota. Clause (3) restricts long-term power purchase agreements that make Minnesota reliant on coal-fired electricity. These three clauses evenhandedly accomplish the same objective: reducing Minnesota's reliance on coal-fired electricity, regardless of where the electricity is generated.

The statute does not discriminate in effect. The statute does not protect Minnesota businesses from non-Minnesota competitors. It does not favor in-state businesses over their out-of-state competitors. Proponents of out-of-state electricity face no more restrictions than Minnesota entities. Moreover, the exemptions are not unique to Minnesota entities – they apply evenhandedly to both in-state and out-of-state entities and projects, and they largely "grandfather" in projects that were already in development.[66] The NGEA does not therefore discriminate against interstate commerce.[67]

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[66] As outlined in Defendants' Memorandum in Support of Summary Judgment, the exemptions apply evenhandedly, and many of the exemptions have been applied to capacity from out-of-state facilities. One of the exemptions, for reliance on facilities if necessary to ensure the long-term reliability of Minnesota's electric system, expressly applies only to "a new large energy facility located outside Minnesota." Minn. Stat. § 216H.03, subd. 7(3).

[67] Even if a particular provision were invalid, it would be severable from the remainder of the NGEA. When interpreting state law, federal courts apply a state's rules of statutory construction. *Alpine Glass, Inc. v. Illinois Farmers Ins. Co.*, 643 F.3d 659, 664 (8th Cir. 2011). Under Minn. Stat. § 645.20, a court should sever an invalid provision unless "it is apparent that the legislature would not have enacted the remaining provisions without those that are to be severed." *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) (citing Minn. Stat. § 645.20). Here, the legislative goal was reducing Minnesota's reliance on coal-fired electricity. If one clause of section 216H.03 were invalid, the
(Footnote Continued on Next Page)

B. The NGEA Does Not Unduly Burden Interstate Commerce.

A statute may also run afoul of the dormant Commerce Clause if the burdens placed on interstate commerce are "clearly excessive in relationship to the putative local benefits." *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). As outlined in Defendant's Memorandum in Support of Summary Judgment, section 216H.03 serves legitimate local interests while imposing virtually no burden on interstate commerce. These interests include promoting a stable, reliable supply of future energy capacity and promoting the use of clean energy.

Plaintiffs' claim of potential lost profit or business opportunity is not a cognizable injury under the dormant Commerce Clause. *See, e.g., Exxon Corp. v. Gov. of Maryland,* 437 U.S. 117, 127-28 (1978) (stating that the dormant Commerce Clause dose not protect against regulation of "the particular structure or methods of operation in a retail market"). Lost profits are not a burden on interstate commerce. *See Southern Waste Systems, LLC v. City of Delray Beach, Fla.*, 420 F.3d 1288, 1291 (11th Cir. 2005) (upholding ordinance that gave a single waste hauler the exclusive right to collect garbage in a municipality because the bidding process was open to both in-state and out-of-state entities); *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1152 n.11 (9th Cir. 2012) (stating that the loss of profits is not a burden on interstate commerce). The NGEA does

(Footnote Continued From Previous Page)

Legislature would plainly have enacted the remaining clauses, which further the objective of reducing reliance on coal-generated electricity.

not prevent the flow of electricity across state lines or otherwise inhibit the operation of the interstate transmission system. It is simply a resource planning tool that is within the authority of utility regulators of the State of Minnesota.

C. The NGEA Applies To Entities Serving Minnesota And Does Not Regulate Extraterritorially.

As outlined in Defendants' Memorandum in Support of Summary Judgment, the extraterritorial doctrine narrowly proscribes state regulation that directly controls commerce occurring wholly outside the state. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 326 (1989). The Supreme Court has not extended the doctrine beyond price control laws that effectively require out-of-state businesses to obtain regulatory approval before changing the price they charge out-of-state consumers for out-of-state transactions. *See Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 669 (2003) (recognizing that the extraterritorial doctrine has only been applied to price control laws). The mere fact that regulation has effects on interstate transactions does not render a statute extraterritorial. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995).

The NGEA is not a price control law, and it does not regulate transactions occurring entirely outside of Minnesota. Instead, the NGEA restricts Minnesota's reliance on coal-fired electricity. The statute applies only to entities serving Minnesota customers. It imposes no requirements on out-of-state entities that do not serve Minnesota customers. *See Alliant Energy Corp. v. Bie*, 336 F.3d 545, 549 (7th Cir. 2003) (noting that states may validly regulate internal matters even if the regulation has external effects).[68]

Plaintiffs misplace their reliance on the decisions in *National Solid Wastes Management Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999) and 63 F.3d 652 (7th Cir. 1995). The statute at issue in those cases prohibited waste generators from using Wisconsin landfills unless the waste generator resided in a community that had adopted a law complying with solid-waste rules promulgated by the Wisconsin Department of Natural Resources and otherwise meeting multiple requirements regarding how material is collected and processed. The Seventh Circuit found the Wisconsin statute had an extraterritorial reach because "all citizens in the effective recycling community must observe the statute's recycling provisions, whether or not they actually dump waste in Wisconsin." 63 F.3d at 655. In essence, the statute required the processing of *all* waste in an out-of-state community to be in accordance with Wisconsin's performance, including waste that was disposed of outside of Wisconsin.

The NGEA imposes no such requirements. Section 216H.03 applies only to utilities serving Minnesota and concerns only electricity that is to be consumed in

[68] The NGEA allows utilities that serve Minnesota to rely on new sources of coal-fired electricity if they offset any new emissions by reducing an existing facility's emissions or by purchasing allowances from an established cap-and-trade system. Minn. Stat. § 216H.03, subd. 4.

Minnesota.[69] Out-of-state entities can sell electricity to other out-of-state entities without regard for the NGEA. The NGEA is a valid exercise of Minnesota's authority to regulate the resources on which Minnesota utilities rely.

II. MINN. STAT. § 216H.03 IS CONSTITUTIONAL UNDER THE SUPREMACY CLAUSE.

The NGEA properly regulates matters of traditional state concern. Nothing in the Federal Power Act ("FPA") or the Clean Air Act ("CAA") prevents Minnesota, through the NGEA, from decreasing its reliance on coal-fired generation.

A. The Federal Power Act Does Not Preempt the NGEA.

A plaintiff alleging preemption must demonstrate that Congress comprehensively regulated a field such that it plainly intended to preempt state regulation, that compliance with both federal and state regulations is a physical impossibility, or that the challenged state law stands as an obstacle to the execution of the objectives of Congress. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). As outlined in Defendants' Memorandum in Support of Summary Judgment,

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[69] Plaintiffs cite *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996), and inaccurately describe the case as "invaliding Alabama statute that prohibited selling repainted cars without disclosing that car had been repainted because repainting could have occurred in a different state." (Pls' Mem. Supp. Summ. J. at 28). In fact, the Court in *BMW* did not invalidate any Alabama statute because no such statute existed. Instead, the Court found that the state court had improperly calculated punitive damages using a formula that considered how many times BMW repainted vehicles both inside and outside of the State. *Id.* at 572-73. The Court held that imposing punitive damages for repainting a car in a state where it was lawful do so would be unfair if the vehicle had no connection to Alabama and was not resold in Alabama. *Id.* at 574. Thus, the *BMW* decision would not prohibit a state from barring the in-state selling of repainted cars.

section 216H.03 does not regulate the same field as the FPA, does not conflict with the FPA, and does not interfere with any of the FPA's objectives or purposes. Accordingly, it is not preempted.

The FPA draws a "bright line," regulating only sellers of wholesale power and sellers of transmission service. The FPA does not regulate the purchasers of those services. *See* FPA Section 201(b)(1); *Federal Power Commission v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (stating that the FPA draws a "bright line, easily ascertained."). Similarly, section 216H.03 in no way regulates the actual transmission of electricity. The "transmission" of electricity is the delivery of electricity from the generation facility to the local distribution system. *See* 16 U.S.C. § 824(b)(1). Regulation of transmission involves the terms and conditions of the transmission itself, not the type of generation delivered over the transmission lines. *See* FERC Order No. 888, 61 FR 21540, 21541 (May 10, 1996).

FERC, which is responsible for administrating and enforcing the FPA, "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 decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges." Order No. 888, 61 Fed. Reg. 21540, 21626, n.544 (1996).

In other words, states are free to regulate decisions to purchase or, in the case of the NGEA, not purchase, certain types of power. The regulation of the resources used by a retail utility to power in-state homes and businesses involves each subject FERC listed as falling under state jurisdiction: resource planning; utility buy-side decisions; and utility generation and resource portfolios. These are the methods by which state regulators choose the mix of resources appropriate for a state and guide their utilities' decisions toward that mix--the very purpose and effect of the NGEA. Indeed, approximately half of the states in the nation have renewable energy guidelines or regulations that require a specified amount of their power be generated from renewable sources. Elizabeth Burleson, *Climate Change and Natural Gas Dynamic Governance*, 63 Case W. Res. L. Rev. 1217, 1251 (2013). Like the NGEA, these types of resource decisions are within the province of the states.

Thus, the NGEA regulates activities that remain entirely on the "state side" of the bright line. There is no conflict preemption because: (a) no NGEA-regulated person faces inconsistent FPA obligations; and (b) no FPA-regulated person faces inconsistent NGEA obligations. There is no field preemption because the FPA regulates sellers at the wholesale level, while the NGEA regulates builders and buyers in Minnesota.

The state's review of a retail utility's purchases is distinct from FERC's approval of the seller's price. *See, e.g.*, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988) (rejecting utility's preemption challenge and recognizing that a state can regulate purchases without entering FERC's exclusive domain, because the state and FERC are doing different things). The NGEA only regulates buyers of wholesale capacity or power, not the sellers of those products.

The NGEA does not interfere with MISO's operation of the transmission system or the MISO energy markets. The NGEA gives no instructions regarding transmission service or the rates charged for transmitting electricity. It does not prevent the flow of physical electricity from entering or leaving the State, and it does not require MISO to reconfigure the transmission grid to ensure that power from an electric facility in another state does not enter Minnesota. As explained above, section 216H.03 does not restrict the sale or purchase of energy in the MISO organized markets.

In its Order of Sept. 30, 2012 (at p.23), this Court asks "whether the NGEA's prohibition related to entering into a new long-term power purchase agreement interferes with FERC's authority to set wholesale rates and regulate agreements." The answer is "no." The NGEA does not set wholesale rates, determine whether wholesale rates are reasonable, or otherwise regulate wholesale agreements. Rather, it simply orders utilities serving Minnesota homes and businesses not to enter certain power purchase agreements to buy coal-fired power, absent an offset. The FPA has left the regulation of the purchase decisions of retail utilities to the states.

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

As set forth in Defendants' Memorandum of Law in Support of Summary Judgment, field preemption applies only to state laws that regulate "in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. U. S.*, 132 S. Ct. 2492, 2501 (2012). Nothing in the CAA suggests Congressional intent to preempt state regulation of utility resource planning. The NGEA is a valid exercise of state authority over resource planning by local utilities and is not preempted by the CAA. The NGEA does not conflict with any provision of the CAA because the NGEA does not regulate emissions in North Dakota or elsewhere.

The NGEA does not regulate carbon emissions. The NGEA does not impose any requirement upon operators of coal-fired power plants to monitor, reduce, or control emissions, even if the plant is a "new" large energy facility. The NGEA reduces emissions not by telling any facility to emit less, but by directing Minnesota utilities to rely less on carbon dioxide-producing sources when providing energy to Minnesota homes and businesses. Such directives are not preempted by the Clean Air Act.

CONCLUSION

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

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