UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

State of North Dakota, et al.,

Plaintiffs,

vs.

Beverly Heydinger, et al.,

Defendants,

Minnesota Center for Environmental Advocacy, et al.,

Amici.

Case No. 11-cv-3232 (SRN/SER)

St. Paul, Minnesota
Courtroom 7B
October 17, 2013
9:30 a.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON

UNITED STATES DISTRICT COURT JUDGE

HEARING ON CROSS MOTIONS FOR SUMMARY JUDGMENT [DOCS. 128 AND 135] AND DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' JURY DEMAND [DOC. 123]

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I N D E X: Page:

P R O C E E D I N G S

IN OPEN COURT

THE COURT: We are here this morning on the matter of the State of North Dakota, et al. versus Beverly Heydinger, Commissioner and Chair of the Minnesota Public Utilities Commission, et al. This is civil file number 11-3232. Let's begin by having the parties enter your appearance. And if you are here as an *amicus*, you may also enter an appearance. We'll begin with the Plaintiffs, please.

MR. BOYD: Morning, Your Honor. Thomas Boyd here on behalf of all of the Plaintiffs.

MR. LORENTZ: Brent Lorentz, Your Honor, on behalf of Plaintiffs.

MR. STENEHJEM: And Wayne Stenehjem, Attorney General of the State of North Dakota, on behalf of the State of North Dakota.

THE COURT: Welcome.

And the Defendants.

MR. CUNNINGHAM: Morning, Your Honor. My name is Gary Cunningham. I'm a member of the Minnesota Attorney General's office, and I'm here representing the members of the Public Utilities Commission and the Commissioner of the Department of Commerce. With me is Mark Everson, also from the Attorney General's office.

MR. DONAHUE: Good morning, Your Honor. I'm Sean

Donahue and I'm here representing the Environmental Defense Fund, *amicus*, and I'll be speaking for the group, along with my co-counsel, Joanne Spalding, who will also be speaking for *amicus* for the Defendants.

MR. STRAND: And, Your Honor, Scott Strand for the Minnesota Center for the Environmental Advocacy.

THE COURT: Very good.

Anybody else present as *amicus* today?

MR. BAKER: Your Honor, John Baker. I'm counsel for the American Public Power Association and the National REC Association. I'll note my appearance, but I don't have plans to present argument pursuant to the letter that the Court should have received yesterday.

THE COURT: Thank you.

Anybody else? Very good. All right.

The Court recognizes Mr. Boyd's objection -- or request for reconsideration, I guess, of the Court's order with respect to permitting those who have made an appearance as *amicus curiae* to argue. I agree, Mr. Boyd, that the request was made late. My concern is two-fold. My concern is to make sure both sides feel that they have an equal opportunity to be heard, and I can assure you that that will happen. This Court wants to get this right, so we could be here a long time. I'm going to keep you here until I'm convinced that I've heard all of you out, so no one will feel

slighted by time.

I thought perhaps since none of the folks who filed *amicus* briefs on behalf of the Plaintiffs plan to argue that the way to approach this fairly would be to give you, Mr. Boyd or anyone from your team, an opportunity to respond to the arguments of the *amicus* who will be arguing on behalf of the Defendants. I think that will create fairness, which is my goal. But my other goal, of course, is I want to hear everybody out here. I really do want to get this right. So, I suppose technically I'm denying your motion for reconsideration. All right.

Now, because obviously the summary judgment motions are interrelated, I think we will begin by having -- unless you folks have a previous plan about how to approach this, my thought was to have North Dakota go first. But had you talked about how to approach this?

MR. BOYD: We had not, Your Honor.

THE COURT: Okay. I am going to assume that when each side gets up, you're arguing both for your motion for summary judgment and in opposition to the other side's motion for summary judgment. That makes most sense.

And we'll leave the question of the striking of the Plaintiffs' demand for a jury trial to the end of the proceeding; please don't let me forget that that motion is there. We will certainly entertain it. As you can see, I

have some sort of a cold, but I will struggle through this with you.

With that said, Mr. Boyd, are you prepared?

MR. BOYD: I am, Your Honor. Good morning again. I'm Thomas Boyd. I'm with the firm of Winthrop and Weinstine, and in that capacity, I'm appearing on behalf of the private Plaintiffs. I'm also a Special Assistant Attorney General for the State of North Dakota and, in that capacity, I'm appearing on behalf of the state entities, the State of North Dakota and the Industrial Commission.

Plaintiffs respectfully request the Court to hold that Minnesota Statute 216H.03 is unconstitutional and to enjoin Defendants and their successors in office from enforcing this provision. Minnesota passed this law in order to advance its policy to eliminate coal-based power generation sources. This is not a traditional resource planning statute. This is a resource elimination statute. By its very nature, the statute interferes with the interstate power market by seeking to eliminate what has traditionally been the most reliable and the least cost-generation source. Its intended effects and its actual effects go well beyond Minnesota's borders.

The statute violates the Commerce Clause in fundamental ways. First, the statute applies extraterritoriality to impose terms and regulate activities

and transactions that involve non-Minnesota entities and that occur entirely outside of Minnesota. It does so by imposing prohibitions, onerous terms and conditions, and uncertain expenses on the development of both new generation sources outside of Minnesota and the contracting with existing facilities outside of Minnesota through longterm power purchase agreements. Second, the statute is protectionist and discriminatory on its face. It inherently discriminates against out-of-state interests by seeking to eliminate the use of coal as a fuel source, a substance which Minnesota -- of which Minnesota has none but upon which its neighbors' economies rely heavily for reliable, low cost power.

It also facially discriminates against the development of new and existing power generation sources outside of the state of Minnesota, while imposing no such burdens on generation sources located within the state. And that applies not only to new large energy facilities but also existing facilities outside of the state. The statute applies to them and them alone without a similar burden on in-state generation. The statute's regulation of carbon dioxide emissions from coal-based power generation sources also violates the Clean Air Act. The Supreme Court has recognized that it's the federal government, not the individual states, that has the authority to determine whether and to what extent to regulate CO2 emissions from power plants.

Minnesota has improperly imposed its own regulatory regime upon its neighbors in the region wholly apart from anything the EPA may impose. And finally the statute's means and methods for regulating power emissions also violates the Federal Power Act. It's the federal government, not the individual states, that has the sole authority to regulate interstate transmission and the sale or wholesale of electricity that flows through interstate commerce. And yet 216H.03 seeks to regulate both transmission and wholesale transactions. Based on any or all of these grounds, section 216H.03 should be struck down as unconstitutional and therefore invalid and unenforceable.

Before proceeding to the legal arguments, I'd like to review some of the undisputed and unrebutted material facts in the record. I believe the record before the Court is fairly simple and straightforward. The Plaintiffs have submitted the only substantive Declarations in the record. In particular, Plaintiffs have submitted Declarations from four electrical engineers with extensive experience and knowledge concerning the matters at issue in this case. They have actual practical experience with having to deal with this statute.

We've also submitted an expert report from Randy Porter, another electrical engineer who has extensive experience and knowledge regarding the matters at issue in

this case. He has actual practical experience with the generation, transmission, and wholesale distribution of electricity in this region, the region to which the statute applies.

The Defendants have submitted no Declarations from anyone with personal or direct knowledge regarding the application of this statute or any other matters at issue. The Defendants have submitted two expert reports, but they're from an attorney and an economist. These individuals have no actual practical experience with MISO or the operation of co-ops or other utilities within this region. They offer purely theoretical observations and opinions. Given the Defendants' challenge to Plaintiffs' standing to bring this action, I would like to review some of the particular facts relating to the Plaintiffs' -- the harm that the Plaintiffs have suffered. And in that regard, rather than covering all the Plaintiffs, I'd like to focus in on three in particular: Basin, Minnkota, and MRES --

THE COURT: And I presume you will be addressing the argument that there's no standing or there's no injury-in-fact.

MR. BOYD: I will be.

THE COURT: Okay.

MR. BOYD: I will discuss some of the evidence that establishing injury-in-fact and/or the threat of injury, but

certainly it does include injury-in-fact that's being sustained at this time.

And I would also underscore that the facts asserted by these -- by these parties through their Declarants have been unrebutted and unresponded to by the Defendants. Each of those entities, Basin, Minnkota, and MRES, are member owned. They're each headquartered outside of Minnesota. They each have members in multiple states. Those states include Minnesota but also a number of other states. In fact, Basin has a nine-state membership region.

Each of these entities operates on the co-operative model, meaning that their members have associated with these out-of-state entities in order to benefit from a collective portfolio of resources and to socialize the cost of obtaining power that they require in order to serve their own members or, in the case of municipalities, their citizens. Each of these entities have uniform, longterm power supply agreements with their members. I believe it's MRES that has membership agreements going out to 2046, and they are not automatically terminated at that point. There's nothing in the contract that allows it to be terminated earlier, so these are very, very longterm agreements.

And these members each make these longterm commitments and, again, in terms of pooling their resources through the membership entity. These contracts require Basin,

Minnkota, and MRES to supply their members with their wholesale electricity requirements. And these contracts require Basin, Minnkota, and MRES to charge each of its members the same common rate. They cannot charge different rates. They have to charge the same common rate. So, all of the costs incurred with respect to the resource portfolio compiled and administered by each of these entities is shared equally by the various members in the various states.

Basin, Minnkota, and MRES are not regulated by the MPUC. They are self-regulated by their boards who are, in turn, elected by their membership. These governing boards, not the MPUC, review and oversee the prudence of their resource portfolio decisions. Basin, Minnkota, and MRES submit resource plans to the MPUC, but for advisory purposes only. I want to underscore the distinction there. Unlike public utilities which are required to submit their resource plans for approval by the MPUC, Basin, Minnkota, and MRES submit theirs to the MPUC; but the only authority, if you could call it such, that the MPUC has is advisory.

Basin, Minnkota, and MRES all plan, assemble and administer their portfolios to satisfy their obligations to deliver wholesale power to their membership. They, these entities, are the entities that acquire the assets. They, these entities, are the parties who enter into the longterm power purchase agreements. It's they who have these

obligations and enter into these transactions, not their individual members. These resource -- the assets and the resource portfolios that are the aggregate of the resources are owned by Basin, MRES, and Minnkota, not their individual members. These resource portfolios are not segregated on a member-by-member basis.

216H.03 has substantially harmed Basin, Minnkota, and MRES by prohibiting and restricting their use of their existing resources and preventing them from obtaining additional resources to be able to provide their members with low cost wholesale power. The prohibitions and restrictions imposed by engaging -- imposed on engaging in the transactions that are statutorily prohibited by the statute impacts all of Basin, MRES, and Minnkota's members. Again, they are all charged a common rate, they all experience the cost relating to -- equally experience and bear the cost relating to the portfolio and any regulation of that portfolio.

Now, to the Court's earlier inquiry, the record contains several examples of harm that has been experienced by these parties and harm that has been threatened by 216H.03. The first I would note and one that has been focused on quite a bit in our pleadings as well as in the briefing are the issues relating to Basin's transfer of electricity from its Dry Forks facility in Wyoming into the Eastern Interconnection to serve its members in northwestern North Dakota. Basin now

faces the prospect that it will have to establish offsets for its use of the Dry Forks facility. This is not something that Basin has dreamt up or imagined. This is something that has been specifically addressed and focused on in one of the PUC dockets.

Again, I know the Court has reviewed the briefs, so you're probably tired of hearing about the Dry Forks facility --

THE COURT: No, no, it's okay --

MR. BOYD: But it's a very important one, and it's one that is in limbo at the moment. The Department of Commerce raised the issue, indicating that in their view they believed that the statute would apply, even though the power had been transferred to serve members in another area. Their view is Basin has one single resource portfolio to serve all of its members, that the Eastern Interconnection flows to some of those members in Minnesota, and therefore there may be a violation that would trigger offsets.

THE COURT: Now, you know in the briefing there's an argument made that, first of all, that the Department of Commerce is not the enforcing agency so that their opinions don't constitute harm, I guess. The other argument that's made is that this Court should abstain until the PUC figures this out.

MR. BOYD: First of all, with regard to whether the

DOC is the enforcing entity, the statute makes it clear it is one of the enforcing entities. This was a PUC docket proceeding, but subdivision 8 of 216H.03 specifically authorizes the Department of Commerce to enforce the statute and to report what it believes to be violations to the Attorney General for action under statute 8.31. So, the statute itself identifies the Department of Commerce as one of the -- or the Commissioner as one of the public parties who is responsible for enforcing the statute. That's why the Commissioner of Commerce is in this case, because the statute so imposes that responsibility on him.

Secondly, with regard to abstention, I want to underscore that that is not something that has been requested or suggested by any of the parties.

THE COURT: I understand, yeah.

MR. BOYD: That has been suggested by the environmental policy group and to my knowledge, at least in the briefs, had not been embraced by the Defendants. It certainly is not embraced by the Plaintiffs. We think that that would be entirely inappropriate. This case has been pending for two years, and no one -- none of the parties -- have ever suggested abstention. In fact, even the environmental groups who sought to intervene quite some time ago never brought up the idea of abstention until now in an *amicus* brief.

The parties and the Court have expended substantial resources in this case, and it's important for us to see it through to a final judgment. There's nothing to be gained by requiring the parties to go through the protracted proceedings that the environmental groups themselves suggest we should go through, which would include PUC proceedings, Department of Commerce opinions, perhaps an Attorney General action, on to the District Court, on to the Court of Appeals, and then perhaps onto the Minnesota Supreme Court. This is what the environmental groups themselves suggest we do in -- under the guise of abstention. That's another way of perpetuating the prohibitions in this unconstitutional statute.

And even if we were to exhaust all of those requirements and spend all those years doing so, it's still not likely that those proceedings would yield a definitive determination, and we would likely end up right back here before this Court. This Court, of course, has the authority to determine whether this statute is constitutional. That's exactly what the United States District Court does and should do. And that's what U.S. District Courts here and around the country have done when these kinds of statutes have been challenged.

Finally, all of the parties would benefit by a decision from this Court. Plaintiffs need a decision in order to eliminate this purgatory of resource planning. And the

Defendants themselves I think recognize they need a decision. This issue has come up and will come up again in MPUC dockets -- or proceedings. And when it does come up, they indicate to the parties that they can't address it, it's not within their power to address the constitutional issues. So, that's not a meaningful avenue to pursue. We would ask the Court to decline the environmental group's invitation to abstain.

With regard to the Basin situation, again I know it's addressed at length in the briefs, but it is something that is still an open issue. And I believe -- certainly I know that Basin wishes to get an order from this Court so it can have a resolution and an understanding of what, if any, obligations it would have. It would like to have the statute declared invalid to remove the threats of those required offsets. But I also believe the Defendants would like to have this Court rule so as to address that issue. That proceeding has not gone anywhere, it's dormant, and we were not able to reach any resolution through this litigation to determine that there would be no threat of offset requirements on Basin.

So, we're asking this Court to address the constitutionality and the validity of the statute to resolve that existing harm that the -- that Basin incurs at this time. And not only do they confront that problem with regard to the use of their own resource, the Dry Forks facility, but they're

also currently and will in the future be prevented from engaging either in the terms of longterm power purchase agreements or power through MISO, power that's generated from other new large energy facilities. We've identified a number of them in this region in Randy Porter's Affidavit.

Similarly, MRES and Minnkota are prevented from purchasing interests or obtaining power from those new large energy facilities to provide wholesale power to their members. Basin, Minnkota, and MRES are all currently prevented from entering into new longterm power purchase agreements with generation facilities located outside of Minnesota. And I'd like to point the Court to specific pieces in the record or documents in the record that reflect this. First of all, with regard to Basin, they recently went through a request for proposals process seeking proposals and seeking to negotiate longterm power purchase agreements. Because the state law prevents them from entering into longterm power purchase agreements of five years or more for 50 megawatts or more, they could not negotiate longer or bigger agreements in that RFP. And that's referred to in -- or that's described in Mr. Raatz's Declaration, among other places, paragraph 25.

MRES has also stated in its Integrated Resource Plan that the statute has expressly prevented it from entering into these same kinds of longterm power purchase agreements, and an excerpt reflecting that can be found in Mr. Wahle's

supplemental Declarations at Exhibit 1. We didn't include the entire resource plan because it's quite lengthy, but we provided the cover pages and the particular excerpt. And then Minnkota -- and you can find this discussed in Mr. Tschepen's Declaration.

Minnkota has acquired rights to surplus power assets from one of the Young plants which is located in North Dakota. This is an asset that belongs to Minnkota but can benefit all of its members, its Minnesota members and its North Dakota members, by generating revenue that, in turn, will reduce their common rates. And that's very important to their members, particularly some of the members in northwestern Minnesota who live in some of the poorest parts of the country, and it includes Indian reservations and other areas where it's not easy to pay the electric bills. Being able to maximize the value of this surplus power is very important to Minnkota and its members.

But because of this statute and because the Young facility is an out-of-state facility, that asset has been devalued because power utilities in Minnesota will not contract with Minnkota for longterm power purchase agreements more than five years for more than 50 megawatts. And Mr. Tschepen discusses that in his -- he's talked to a number of potential customers himself and they've said, "We can't do it." That's important because they can obtain a greater value

from that power the longer term they can negotiate for that longterm agreement. If they can get 10 years or 20 years, they're going to get a better and a higher price for that power. And again, that will ensure, eventually to the benefit of all of their members, by reducing their common rate. So, this surplus power asset has been devalued. That's something that has already happened. That's something that is an existing harm.

Basin and MRES also participate in the MISO system -- or the MISO energy markets, and this in turn imposes a risk of incurring obligations to offset for CO2 emissions associated with power they may obtain through the MISO energy markets. Mr. Porter has explained in his report that at any given time the power that you would purchase from the MISO market includes power that was generated by or from some of these prohibited sources, whether it's a new large energy facility from outside of Minnesota or power that was obtained through a longterm power purchase agreement with an out-of-state entity.

That power is part of the resource portfolio that MRES and Basin supply to their members. So, the use or the purchase of power from MISO can trigger this statute. Now, one of the arguments that the Defendants have asserted and I think the environmental groups have asserted is you can't know for certain where that power is coming from. As we know and I

think it's undisputed, MISO does not match sellers with buyers; it just determines what would be the lowest price for a particular day, clears the price, and dispatches the power. Because coal is typically the most reliable and least expensive, coal fuel is typically going to be part of that power. In fact, again, as Mr. Porter said, it's always going to be in there. So, what is Basin and MRES to do? In the Dairyland proceeding, which I know has also been the subject of quite a bit of focus in the briefs, the MDOC established at least in its arguments in that case that the statute applies to purchases made from the MISO markets. And the way the statute applies is that you take a proportion of -- or you conduct some kind of prorated calculus, but the basic essence of the formula would be you look at what proportion of the utilities portfolio includes prohibited sources and then you look at what a portion of its load is supplied to Minnesota, and you require an offset in that amount for those emissions.

Again, that's not something that the Plaintiffs have dreamt up, it's not a figment of our imagination. That's been the discussion in and that was the articulated position of the DOC in the Dairyland proceeding. It was fortunate that Dairyland was able to, as a matter of sheer luck, qualify for one of the statutory exemptions. Otherwise they would have to struggle with coming up with some way to offset. And since I'm on the subject of offsets, another aspect of the record

that the Plaintiffs have developed is they have established through undisputed evidence that there are no realistic or available means to comply with these offset requirements. So, the transactions are prohibited, and there's no way to offset.

Now, the statute refers to two ways in which offsets could be obtained, and these are offsets that have to be shown to the PUC's satisfaction, whatever that may require. But the first way in which to offset would be to reduce an existing facility's contribution to statewide power sector carbon dioxide definitions. This is not a meaningful or realistic option today. Mr. Porter has set forth in his Declaration that carbon capture and sequestration technology, while it is being developed and it is promising for the reduction of CO2 emissions, it's not currently commercially available.

In fact, that's one of the ironic things here is that this statute impedes and interferes and prevents the development of that technology. Without access to that technology, it's pointless from an economic standpoint to add one resource for a certain volume of power only to be required to then take off line the same or greater amount of potential power out of your resource portfolio. I don't know if I said that very well, but it's basically a net nothing or a net loss --

THE COURT: Right, I understand.

MR. BOYD: So, that first proposed way to offset is

not meaningful or realistic at all. The second way to purchase -- or the second way to offset is to purchase carbon allowances from a state or group of states that has a carbon dioxide cap-and-trade system in place. This too is not available. It's undisputed that Minnesota has not created and has not joined such a system.

The Defendants -- excuse me, the Plaintiffs, Mr. Rutter and Mr. Raatz, as well as Mr. Porter, have confirmed that these allowances are not available to Minnesota utilities. And, in fact, the Defendants do not rebut that. Mr. Hempling, indeed, expressly stated he was not offering an opinion on this, and Mr. Hempling is one of the experts. He's the lawyer that the Defendants have submitted a report from. He stated he's not offering an opinion on this subject and he was assuming that offsets are not available.

So, the undisputed evidence in the record is those offsets are not available to the Plaintiffs, so there's no -- there's no way to offset. And even if there was, the paragraph that follows the description of those two ways to offset indicates that the project proponent must establish that the proposed offsets are permanent, quantifiable, verifiable, enforceable, and would not have otherwise occurred. Each of those in and of themselves are difficult standards to meet, but collectively they're essentially insurmountable. And I want to focus on the last requirement

there, that the offsets would not have otherwise occurred.

Had the GRE proceeding touched on that issue, they were planning to use the Spiritwood facility in order to generate coal-fueled power, and they explained to the PUC and the DOC that the power from that station would have certain technologies where they would be able to reduce or capture -- excuse me -- the CO2s -- I may be a little inarticulate in terms of the technology, but basically the argument was they would be able to provide this in a way that obtained offsets in and of itself. That was their plan.

And the environmental groups argued, well, that's great, that's very laudable, but because that's part of your plan, these offsets are going to occur anyway. They don't meet the standard of being offsets that would not have otherwise occurred. And if the EPA -- or if and when the EPA promulgates its regulations and offsets are obtained as a result of complying with those Federal Regulations --

THE COURT: That won't count.

MR. BOYD: -- that won't count.

THE COURT: Yeah.

MR. BOYD: Finally in terms of harms and injuries, we've submitted supplemental Declarations from the individuals from Basin, Minnkota, and MRES -- again, those are Mr. Raatz, Mr. Tschepen, and Mr. Wahle -- they have established that the proposed procedures for applying to the MPUC for approval of

transactions -- of the prohibited transactions or even ones that are a close call -- and I think there's been some suggestion we should again go through this process and see if we can get approval for a transaction, but that's not a meaningful alternative.

That's not the way business is done in compiling these portfolios. Seeking PUC approval would require the disclosure of the confidential terms and conditions of the proposed transaction. These declarants have confirmed that's a deal killer. Conditioning the transaction on MPUC approval or indemnification by the counter-party is also a deal killer. Undergoing lengthy, protracted, and uncertain proceedings, again a deal killer. That's not my rhetoric, that's from their supplemental Declarations. It's not a meaningful alternative.

So, in summary -- again focusing on Basin, Minnkota, and MRES -- they have all established that they're being harmed by the prohibitions imposed by the statute, and they have no meaningful way to proceed with seeking offsets or obtaining approval of the transactions in advance, and the Defendants have not rebutted any of this evidence. All of that is not only intended to support our arguments on the law but also I think clearly establishes that the parties have standing to bring this case. I focused in on Basin, Minnkota, and MRES not because the other Plaintiffs do not have standing

but instead, as we've discussed in the earlier hearing on the Defendants' motion for judgment on the pleadings, in the Eighth Circuit the principle is standing for one is standing for all. So, there is more than adequate standing -- or more than adequate evidence in the record to support -- or to find that the parties have standing in this case.

If I may -- and I hope I'm not lumbering along too slowly -- I would like to move onto the legal arguments.

THE COURT: That's fine. Sure.

MR. BOYD: First of all, with regard to the Commerce Clause, it's Plaintiffs' contention and I think it's quite clear through the briefing that the statute, 216H.03, violates the Commerce Clause in two basic ways. First, it violates the extraterritoriality doctrine by regulating parties' activities and transactions wholly outside of Minnesota. Second, it's protectionist and discriminatory on its face because it imposes burdens on out-of-state parties' interests and activities without corresponding burdens on in-state parties, interests or activities.

First, the extraterritoriality aspect. We believe the extraterritoriality scope of the statute is evidence by its plain terms. Subdivision 3(2) categorically prohibits imports based on activities that occur entirely outside of Minnesota. Specifically, the statute says, quote, "No person shall import or commit to import from outside the state power

from a new large energy facility."It's difficult to imagine how a state law could begin with the words "No person shall import or commit to import from outside the state" and not violate the dormant Commerce Clause.

This is a statute that directly controls commerce that occurs wholly outside the boundaries of the state. All of the regulated activities relating to the generation of the regulated power from these out-of-state new large energy facilities occurs entirely outside of Minnesota. The generation facility is located outside of the state, the generation itself occurs outside the state, the emissions associated with the generation occur entirely outside the state.

The Court has already recognized that these terms -- or I should say the Court has observed in your earlier order, your September 30, 2012, order, I think it was footnote 10, that on its face these -- the plain language purports to regulate these out-of-state activities based on the emissions that are generated outside of the state --

THE COURT: And isn't that the distinction with this recent Ninth Circuit opinion?

MR. BOYD: The out-of-state activities?

THE COURT: Yes, because the Ninth Circuit opinion really has to do with fuel emissions that occur in the state of California that cause environmental damage in the state of

California, that cause economic damage in the state of California and the like.

MR. BOYD: That's absolutely right. The ethanol that the California law regulates may or may not originate from out of state but it is something that can be traced to the state. And then when it's consumed in the state, that consumption results in carbon dioxide emissions. In the Ninth Circuit, the -- and I -- as the Court has mentioned the case, I'd like to go ahead and address some additional ways in which I think it's inapplicable to this case.

THE COURT: Sure. Sure.

MR. BOYD: First I would note that the Defendants themselves I don't think even cited or relied on the case. The environmental policy groups raised it and I think cited to it once. We disagree with a number of the analyses and views of the Ninth Circuit. But as the Court has already noted, the key distinction is the nature of the statute that the Ninth Circuit was looking at. It's materially different from this case, as is the regulator.

From the very outset of that opinion, the Ninth Circuit focused on and underscored the fact that California is different. It's recognized in the Clean Air Act, it's been recognized by Congress to have a certain stature, and it's been carved out and can regulate outside of the Clean Air Act. Minnesota has not been so exempted, so to the extent that

California has decided that they want to regulate the in-state consumption of ethanol, which in and of itself results in carbon dioxide emissions through this well-to-wheel approach, that's, I think, the Ninth Circuit's view that California can do that because California is unique. Minnesota has not been so exempted.

Second, the Ninth Circuit was analyzing a statute that did not prohibit the sale or the supply of any particular kind of fuel. That's again another big distinction, material distinction between that statute and 216H.03, which as I've said is a resource elimination statute that categorically prohibits transactions. Even the California law doesn't prohibit transactions. It doesn't say, "You cannot engage in the sale of certain ethanol." This statute prohibits transactions unless you can demonstrate offsets, which as the record demonstrates, are not available. So, it's a prohibitive statute that completely eliminates the resource option.

Third, California is regulating a good that can be traced. Ethanol is shipped through trucks and boats and can be traced. And if a supplier wants to ship it to California, they have control over that. If they don't want to send it to California, they have control over that. Electricity is different. It's injected into a regional grid. Basin, MRES, Minnkota, they can't put that electricity in a truck and make

sure it doesn't go to Minnesota.

And finally, the California fuel standards set forth an elaborate formula and have established a cap-and-trade system that enable market participants to calculate with precision and in advance how they would plan to comply with those requirements. The out-of-state market participants are not required to come to the California regulator and seek permission or to go through a lengthy process, a PUC docket.

Minnesota statute provides for no such certainty. There is no established or approved cap-and-trade market. And in fact the statute itself requires project proponents to come before the MPUC to seek permission to try and demonstrate that they can establish these offsets that are not available. For all of those many reasons, not the least of which the fact that ethanol, when it's consumed, emits carbons, for all of those reasons the statute that was addressed in the Ninth Circuit decision, in the *Rocky Mountain* decision, is not applicable to this case or this statute.

With regard to subdivision 3(2), again that's the prohibition on importing power from new large energy facilities, the contention that the power is to be subsequently -- after it's generated is to be imported and consumed in Minnesota does not justify regulating a transaction that otherwise involves parties and generation sources and activities that are wholly outside of the State of

Minnesota. There's nothing about importing or consuming that electricity that results in CO2 emissions. The statute focuses entirely on regulating emissions that occur outside the state of Minnesota.

Subdivision 3(3) of the statute categorically prohibits certain longterm power purchase agreements for power generated outside the state of Minnesota. Again, this statute directly controls commerce occurring wholly outside the boundaries of the state. All of the regulated activities relating to the generation associated with these new longterm power purchase agreements occur outside of Minnesota. The generation is outside, the emissions are outside, all of the activities that would trigger regulation occur outside of Minnesota.

The contention that the power may be generated -- and I would -- we've made this distinction and I want to take this opportunity to underscore it, we dwelled on it in our reply brief that there are important distinctions between capacity to generate power on the one hand and power. Subdivision 3(2) which talks about importing power is dealing with the concept of power that's been generated and is flowing through the transmission system.subdivision 3(3)), which deals with new longterm power purchase agreements deals with capacity, and that's the capacity to generate power.

However, just because power may be generated from

the longterm power purchase agreement and may be consumed in Minnesota does not justify regulating a transaction and a generation activity that otherwise occurs entirely outside the state of Minnesota. Again, this statute focuses entirely on regulating emissions that may occur, if at all, outside of the state of Minnesota. In our view, subdivisions 3(2) and 3(3) are classic violations of the extraterritoriality doctrine. They reflect Minnesota's disapproval with activities occurring in other states and seek to regulate those out-of-state activities. That is unconstitutional.

The environmental groups and I think perhaps the Defendants, as well, have argued that this extraterritoriality doctrine does not apply in this case because the doctrine only applies to price fixing statutes. That's simply wrong. I recognize that the Ninth Circuit has ensconced that view in the *Rocky Mountain* case and in another recent case, but that is the Ninth Circuit's view. That is not the view taken by the United States Supreme Court. The focus for that view has been *Pharmaceutical Research and Manufacturers versus Walsh*, a 2003 decision, and it focuses on one paragraph of a very lengthy decision.

That case involved whether a statute that addressed pricing of prescription drugs violated the extraterritoriality -- well, it addressed a number of issues, but in this particular instance or this particular part of the

decision, the Court was addressing whether the statute violated the extraterritoriality doctrine. Again, the statute at issue was a statute that dealt with pricing for prescription drugs. So, the argument was it was a price control statute.

When Justice Stevens wrote that paragraph -- and again this all revolves around one paragraph of a very lengthy decision. When Justice Stevens wrote that decision, he was focusing within the framework of the argument that had been made, and that is this is an unlawful price control statute. And Justice Stevens said, "It's not a price control statute, so we're not going to apply the doctrine." He didn't say it can never be applied to any other statutes, any non-price control statutes.

And I would think that if the Supreme Court was going to overrule its prior *juris prudence* on the extraterritoriality doctrine, it would have done so expressly and would not have left it for some divining from a paragraph in a long opinion.

THE COURT: And arguably this Seventh Circuit opinion that you bring to the Court's attention, this *National Solid Waste Management*, isn't the application of the extraterritorial provision to a non-price fixing?

MR. BOYD: Yes, it is. The Seventh Circuit, the *Meyer* case, does exactly that. And more recently, the

Pharmaceutical Versus Walsh case was a 2003 case, more recently -- in fact, in the last year -- the Sixth Circuit applied the extraterritoriality doctrine to a bottle labeling law out of Michigan. And the Sixth Circuit said, "We're not really sure whether or not this still makes sense to have an extraterritoriality doctrine, but it does apply, it's still the law." And so they applied it to strike down that Michigan law. They applied the extraterritoriality doctrine to strike down a Michigan law that was not a price control law.

And then one of the judges issued a concurrence saying that we think that this is a decision that merits the Supreme Court's attention, and we hope they take it. The Supreme Court denied cert. The Eighth Circuit, as well as the other circuits -- the Seventh Circuit, the Sixth Circuit, several other circuits -- both before and after the *Pharmaceutical Research Versus Walsh* case, have applied the doctrine to statutes that are not price control or price fixing statutes. The second basic argument that the Plaintiffs assert in terms of the way in which 216H.03 violates the Commerce Clause is on its plain language, it is protectionist and discriminatory against out-of-state interests, and it does not similarly impose burdens on in-state interests. The statute inherently discriminates against out-of-state interests by seeking to eliminate the use of coal as a fuel source.

This is a substance of which Minnesota has none, but as I indicated at the outset, this is something that its neighboring states rely upon heavily in their economies, not only for revenue but for low cost and reliable power.subdivision 3(2) applies solely to prohibit the importation of power from new coal generation facilities located outside the state of Minnesota. The Defendants have argued this is an even-handed regulation because the subdivision right before that, subdivision 33(1), prohibits the construction of new large energy facilities in Minnesota. In fact, this is not evidence of evenhandedness. As noted, Minnesota has no coal. In this day and age of RTOs, there is no economic justification for incurring the cost to transport coal here to generate power. So, 3.1 is prohibiting something that would never happen given the structure of the grid and the electronic -- or the electric energy markets of today.

With the development of MISO and the integrated markets, there's no longer any reason that anyone would build a coal fuel plant in Minnesota because the generator can now offer the power into the energy markets from any location and forego the cost necessary to transport the coal to Minnesota.subdivision 3(3) also facially discriminates against out-of-state interests by applying solely to longterm power purchase agreements with existing power sources located outside the state of Minnesota while imposing no such burdens

on a longterm power purchase agreements with power sources located within the state. Subdivision 3(3) prohibits longterm power purchase agreements that would increase the statewide power sector carbon dioxide emissions.

The use of the word "increase" is unique to that provision. With regard to subdivision 3(2) which prohibits importing from new large energy facilities, that applies if that transaction would contribute to the statewide power sector carbon dioxide emissions. "Contribute" versus "increase."So, the prohibited transaction under 3(2), large new energy facilities will always trigger, it will always contribute to the statewide power sector carbon dioxide emissions; 3(3) will only be triggered if the transaction increases the state power carbon sector dioxide emissions. A longterm energy contract with a generation source inside the state of Minnesota will never trigger that provision; that's because the emissions from that existing facility in Minnesota is already counted as part of the statewide power sector carbon dioxide emissions.

The statute and that definition, I believe, is in subdivision 2 of section 216.03. Subdivision 2 defines "statewide power sector carbon dioxide emissions" 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." So, the in-state -- the existing in-state facilities emissions are already calculated as part of the total annual emissions of carbon dioxide from the generation of electricity within the state, contracting -- entering into a new longterm power purchase agreement with that in-state entity will not increase the power sector emissions because those emissions from that facility are already counted, whereas -- well, I'll pause. I want to make sure I'm clear on that. The only entities -- or the only -- well, the only entities that have the potential of increasing the power -- the public power sector carbon dioxide emissions are out-of-state entities.

Again, this is not something that I dreamed up or is a figment of the Plaintiffs' imagination, this is something that has been addressed in the PUC dockets. And as examples, in my supplemental Declaration, the Boyd supplemental Declaration, Exhibits Y and Z -- I believe it's Exhibits Y and Z -- include an exchange between the Department of Commerce and Basin dealing with a longterm power purchase agreement with the Boswell facility, which is located in Minnesota. And the DOC questioned whether or not that would trigger the statute. And Basin responded saying it would not trigger the statute because the emissions from Boswell are already counted, so entering into -- whether it's Basin or anybody else, entering into a longterm power purchase

agreement with that entity will not increase the statewide public power -- or excuse me, the statewide power sector carbon dioxide emissions. And there has been no enforcement action taken as a result of that longterm power purchase agreement with the in-state facility, Boswell.

I'd like to respond briefly to some of the arguments the Defendants have made in response to the Commerce Clause challenges. First, they've asserted that this statute is merely an extension of Minnesota's traditional authority to regulate. That's simply not true. Minnesota's traditional authority to regulate has focused on Certificates of Need and siting and construction and operation of power plants inside of Minnesota. And to some extent the siting and construction of transmission equipment inside of Minnesota. And they also -- at least the PUC -- has a limited authority over public utilities to determine the retail rates that those utilities can charge to their consumers. But the authority to determine what retail rates public utilities can charge to their consumers does not give them the authority to regulate either transmission or wholesale transactions.

The PUC's authority to regulate rates that public utilities can charge to their customers does not apply to co-ops or municipalities. Furthermore, it's based on a prudence review, which is essentially a determination of what costs can be passed through to the consumer. It doesn't give

them control over the wholesale transaction. The utilities engage in the wholesale transaction, and then the PUC can determine whether or not that was a prudent transaction and whether or not the cost can be passed through. But that is not a regulation of the wholesale transaction.

This is not a resource planning statute. Again, it's a resource elimination statute. This is a punitive statute. It punishes anyone who participants in these prohibited transactions. And lastly, this is not an extension of the renewable portfolio standards. The Plaintiffs do not concede that renewable portfolio standard laws are constitutional. That's not the subject of this lawsuit, but it bears noting that these statutes have been passed in other states and are the subject of ongoing litigation. That is an open question, whether or not these are constitutional laws.

We would prefer to focus on the material differences between this statute and the RPS statute. Whereas the renewable portfolio standard law is intended to promote diversification and, in turn, promote reliability and obtain lower cost power for the consumer, in contrast to that objective of the renewable portfolio standard, 216H.03 is a resource elimination statute. It is anti-diversification. And again, it's eliminating a resource that traditionally has been the most reliable and least cost alternative, so it's anti-diversification in order -- or not in order but that

would achieve higher cost and less reliability. So, it's entirely different in that respect from RPS.

RPS, renewable portfolio standards, statutes did do not dictate what transactions a utility can engage in, whereas 216H.03 categorically prohibits and perpetuates that prohibition of certain transactions. And finally, renewable portfolio standards do not require state approval for particular transactions. Again, 216H.03 requires project proponents to come before the MPUC to obtain on approval of the prohibited transactions. Moving on -- and I'll try and be more brief with regard to the preemption arguments.

Moving onto the Clean Air Act. This statute is preempted by the Clean Air Act. 216H.03 attempts to regulate, quote, "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 of the state and consumed in Minnesota." That's a direct quote from subdivision 2 of the statute, and that is a direct violation of the Clean Air Act, that is because the EPA has been assigned the responsibility of determining whether and to what extent to which carbon dioxide emissions from power plants should be regulated.

The Supreme Court has held in *American Electric Power versus Connecticut* that carbon dioxide constitutes an air pollutant under the Clean Air Act and that Congress has

delegated to the EPA -- not to Minnesota -- Congress has delegated to the EPA the decision of whether and how to regulate carbon dioxide emissions from power plants. And in fact, the EPA is in the midst of a process of promulgating proposed regulations of carbon dioxide emissions associated with coal generation of electricity. Once a pollutant falls within the EPA's regulatory framework, as with carbon dioxide, any effort to regulate or preclude emissions of that pollutant must proceed through the process created by Congress and the EPA.

Relying on this principle, courts have rejected federal common law nuisance claims. In the *American Electric Power* -- excuse me, I'll just make a statement here first before giving you the authority. Relying on these principles, the courts -- the federal courts, the Supreme Court and the Circuit Courts -- have rejected federal common law nuisance claims, federal law -- or federal common law -- excuse me -- federal common law nuisance claims, state law common law nuisance claims, and state statutes. So, federal common law, state common law -- and state law -- state statutes, the Supreme Court has struck all of those down where those statutes seek to circumvent or supplement the federal regulatory scheme. In this case, section 216H.03 apparently seeks to supplement the federal regulatory regime.

Minnesota is barred from doing that. Minnesota

cannot create its own regime, whether it's intended to circumvent or supplement. It's not for Minnesota or any other state to deviate from the longstanding structure by superimpose -- the longstanding federal regulatory structure by superimposing its own standards. So, Minnesota is not authorized to regulate CO2 emissions from power plants. Independent of this, even if they somehow had the authority to regulate the emissions within Minnesota, Minn. Stat. § 216H.03 goes beyond that and seeks to regulate all emissions of carbon dioxide from the generation of electricity that is imported from outside of the state. They purport and seek to regulate carbon dioxide emissions that occur outside of Minnesota --

THE COURT: Let me interrupt you, and this is getting you off track but it reminded me of another point. Isn't that also an argument that can be made under the dormant Commerce Clause analysis with respect to extraterritorial application, that is that other states that attempt to regulate carbon emissions, they could conflict and --

MR. BOYD: That's right.

THE COURT: -- and the balkanization theory, you didn't mention it --

MR. BOYD: It is, and that is certainly an argument that the Plaintiffs assert, that this type of state-by-state regulation of CO2 emissions will give rise to balkanization. If this statute is permitted to stand, it would be my opinion

that it's quite likely that there would be balkanization because allowing this statute to stand would give those other states a blueprint, and they would know the framework of this statute that they could pass in their own states. And rather than prohibiting emission sources -- excuse me -- generation sources that emit carbon dioxide, they may decide to outlaw nuclear power or biomass or any number of different resource -- or generation sources.

So, there would be most certainly the concern of balkanization --

THE COURT: And I think it would be most vulnerable in this offset cap-and-trade issue if everybody had a different rule about it.

MR. BOYD: That's exactly right. And the way New England has addressed this issue, for example, the states have worked cooperatively. There is not a state in New England that has said, "Okay, we're going to take control of this, we're going to pass a law and hoist it on everyone else." They work cooperatively. And that was something that Minnesota seemed to be intending to do when Governor Pawlenty signed on to the Midwest Greenhouse Gas Accord. That was a document that, I think, indicated that the states would work cooperatively to develop cap-and-trade systems or other regulations, not imposing their will on the other states but working cooperatively as they've done in New England.

That is not what this statute does. And, again, if this statute is upheld, it's a blueprint and it gives the other states in this region the ability to pass their own law prohibiting their least favorite generation source in order to promote their most favored generation source. And that will balkanize and will interfere with any potential for a cap-and-trade system. As I indicated, the second argument on the Clean Air Act is that Minnesota does not have that authority to impose its will on other states.

In fact, the Clean Air Act and the EPA have recognized that there may be instances where states may have concerns about emissions that are occurring in other states, and there are procedures that are established for that state to Petition the EPA for relief. And if the EPA ignores them and ignores their Petition and their expression of concern about emissions occurring in another state, the law allows them to come to federal court to review the EPA to take action. That is The avenue. That's the established avenue and the exclusive avenue that states have if they have concerns about emissions in other states.

Lastly, the Minnesota -- Minn. Stat. 216H.03 is preempted by the Federal Power Act. The Supreme Court stated long ago in *Attleboro*, and Congress established in the Federal Power Act that the federal government has exclusive authority to regulate the transmission of electric energy that flows

through interstate commerce and the sale of energy at wholesale that flows through interstate commerce. Nonetheless, 216H.03 seeks to regulate transmission and wholesale transactions. First with regard to its regulation of transmission, 216H.03 does so in a number of ways. First -- and, again, I'm focusing on 216H.03, the first subdivision, subdivision 1, expressly defines new large energy facilities to include transmission lines.

Second, subdivision 2 specifically includes transmission line losses as part of the definition of what constitutes statewide power -- statewide power sector carbon dioxide emissions. It specifically includes transmission line losses as part of that definition. And third and most importantly, subdivision 3(2) necessarily applies to the transmission of power. That's the prohibition on importing or committing to import power from a new large energy facility outside the state of Minnesota. As we've discussed earlier today, power is electricity that has been generated and is flowing through interstate commerce. The term "import" refers to the transmission of that power. That's what that term means in the RTO world.

In the old days when participants would focus on contract path, maybe "import" meant something else. But today, the word "import" means the transmission of that power from that out of state source into Minnesota. And 216H.03

imposes all of its prohibitions, terms, conditions, and uncertain costs on those transmission activities. The statute also regulates the sale at wholesale of power that flows through interstate commerce. As we've discussed a number of times this morning, subdivision 3(2) prohibits any person from importing or committing to import from outside the state power from a new large energy facility.

If and when Basin, Minnkota, and MRES engages in those activities, they are engaged in wholesale transactions. That's what they do. They deal in wholesale power. And when they provide that power to their members, that's a wholesale transaction. When they acquire that power, that's a wholesale transaction. That's entirely wholesale, and Minnesota does not have the authority to regulate those transactions.

Similarly, subdivision 3(3) also seeks to regulate wholesale transactions by prohibiting any person from entering into a new longterm power purchase agreement that would increase the statewide power sector carbon dioxide emissions. Again, Basin, Minnkota, and MRES, when they engage in those activities, when they transact and enter into a new large energy -- excuse me, a new longterm power purchase agreement, that's a wholesale transaction that involves wholesale power. And if and when that power is delivered by the source to the member, that's a wholesale transaction; that is not a retail transaction. So, 216H.03 seeks to impose restrictions and add

cost to those purely wholesale transactions.

FERC is the only entity with the authority to evaluate and control the implications of such transactions and expenses on a regional and national basis. 216H.03 plainly interferes with FERC's plenary authority to set wholesale rates and regulate all agreements that might effect those wholesale rates. 216H.03 does not constitute a state regulation involving the sale at local retail rates. Again, Minnesota's traditional authority has been limited to the siting and construction of power plants and transmission agreements and retail prices that are charged to the consumer.

But as we've discussed, the retail -- the authority that the PUC has to oversee those rates charged by public utilities does not apply to co-ops, does not apply to munis. It also is subject to the application of a prudency review. It's not dictating wholesale transactions, it's not interfering with wholesale transactions. Utilities engage in the transactions that they believe are likely to provide the most reliable and least cost power. And then the MPUC determines whether or not that's the case and whether those costs can be passed through as a retail -- in the form of the retail rate.

That's entirely a retail transaction. That does not give the MPUC or Minnesota otherwise the authority to regulate the wholesale transactions that MRES, Minnkota, and Basin are

engaged in. There simply cannot be a dispute that the federal government has exclusive jurisdiction over the terms and conditions of wholesale transactions, and if states engage in the process -- in a process that amounts to wholesale ratemaking, they're exceeding their authority.

I'd like to finish just by citing to a couple of very recent cases, one of which is in our brief. The *PPL Energyplus versus Nazarian* case from the District of Maryland that was decided on September 30 of this year, and we've cited to it. In that case, the Court held that a generation order issued by the Maryland PUC was a violation of the Federal Power Act and struck it down as being preempted.

The Court in that case said, quote, "The Court does not perceive, for purposes of field preemption, any meaningful difference between state actions directed on the demand side of the wholesale transaction and those directed to the supply side of the wholesale energy market." So, there's no merit to the Defendants' argument and the environmental groups argument that the State is entitled to regulate the purchase or the buy side of a wholesale transaction. The only, quote, "Regulation that they're authorized to engage in involves public utilities and relates to whether or not a cost incurred by that public utility in a wholesale transaction can be passed on to the retail consumer in the form of the rate."

The other case I would note similar to the *Maryland*

case is a case from the District of New Jersey, and this was a -- this is a continuation or maybe a conclusion of a case that the Court had cited to in your September 30, 2012, order. It's in the proceeding of *PPL Energyplus versus Solomon*. The Court had cited to the order in that case which had denied a motion to dismiss. The Defendants had argued that the Plaintiffs had not established -- or stated a claim for preemption under the Federal Power Act. The Court rejected that, the case went forward. Last Friday the Court issued its findings and held that, in fact, the Maryland statute -- or excuse me the New Jersey statute does violate the Federal Power Act --

THE COURT: Do I have a copy of those findings?

MR. BOYD: No, you do not. That came down last Friday.

THE COURT: Okay. Is it possible you could provide that to the Court?

MR. BOYD: Absolutely.

THE COURT: Okay.

MR. BOYD: Your Honor, I greatly appreciate your time and patience in hearing me out this morning. And we would again ask the Court to grant Plaintiffs' motion for summary judgment, to hold that this statute is unconstitutional and cannot be enforced, and to deny the Defendants' motion for summary judgment in all respects.

THE COURT: Thank you, Mr. Boyd.

MR. BOYD: Thank you.

THE COURT: Mr. Cunningham, we're going to take a brief break, allow the court reporter a moment and everybody else a moment, so we will resume at 11:00 a.m. Court is briefly adjourned.

(Short break taken.)

THE COURT: Mr. Cunningham.

MR. CUNNINGHAM: May it please the Court, my name is Gary Cunningham. I'm an attorney with the Minnesota Attorney General's office, and I represent the members of the Public Utilities Commission and the Commissioner of the Department of Commerce.

The question before the Court is the constitutionality of a state statute. You've heard a lot about this statute. It's a part of what is known as the Next Generation Energy Act. It was passed in 2007 by the State legislature and signed into law by the Governor. Among other goals for the Next Generation Energy Act provides for the use of more renewable energy and for more energy conservation. The Next Generation Energy Act is essentially an act of good citizenship on the part of Minnesota with respect to both the needs of its citizens now and in the future and with respect to the future as a whole.

With respect to the portion of the Next Generation

Energy Act that's at issue in this case -- this is this 216H.03 is a resource regulation statute -- it does deal with a resource because it's used to generate energy in this state --

THE COURT: But it is unprecedented, and there is no coal that generates electricity in this state, right?

MR. CUNNINGHAM: Your Honor, if we're looking at the Commerce Clause --

THE COURT: No, I'm just looking at what you just told me. You said it regulates resources in this state. It regulates coal that generates electricity, and there is no coal-generated electricity in this state.

MR. CUNNINGHAM: No, there is coal-generated electricity in this state. There are coal plants in this state. The Boswell plant that Plaintiffs mentioned is in this state. It's a coal-burning state. There are coal plants in this state. The statute forbids the construction of new coal plants in this state --

THE COURT: And, of course, we're not concerned about the regulation of any activity in this state. That's fine. The regulation of -- this state does have the power, I think, to control emissions if they were to exist from coal-generating plants in this state. The question is whether it has the power to regulate resources outside the state.

MR. CUNNINGHAM: And it is not regulating resources

outside of the state. It is regulating the use of electricity in the state --

THE COURT: But, you see, what makes it different is this: Electricity that comes to this state, to our consumers, is not harmful. It's not like the fuel emissions in California or tainted food or flammable clothing. We would have a local interest in regulating any product that is received by our consumers that is harmful. Electricity is not harmful. Nobody disputes that.

The only harm that occurs is at the point of generation. So, to the extent that this statute purports to regulate out-of-state coal generation, it is regulating it only out of state. There is nothing harmful about that electricity when it arrives in our consumers' homes.

MR. CUNNINGHAM: Your Honor, I understand your point, but that is a point questioning the wisdom of the statute, not whether the statute is unconstitutional or not --

THE COURT: No, I think it bears directly on the extraterritorial argument.

MR. CUNNINGHAM: Well, the legislature determined that we did not want to rely on coal-generated electricity because coal, as a resource, has two problems. One of the problems is its future is unknown. If anything, the future of coal is not good because the price of coal is going to go up due to what is known in economics as "externalities." So,

that is a legitimate basis to regulate a resource is whether it's a stable source for future energy.

Another legitimate reason to regulate a resource is the problems associated with that resource or the good things associated with that resource. For example, the Next Generation Energy Act calls for the use of more renewable energy. That's not focusing on the electricity, that's focusing on the source of the electricity. And having more renewable energy is good because fossil fuels are a limited future resource --

THE COURT: Nobody disputes that, and nobody disputes that -- frankly, that we have a problem with -- in this country with emissions from coal-generating plants that we need to address. The question here is not the environmental issue. That's pretty well-settled. The question is the power of the Minnesota legislature under the Constitution and under the federal frameworks that directly address these issues to superimpose itself on entities entirely outside the state.

MR. CUNNINGHAM: Excuse me, Your Honor. Your Honor, under the law that's been -- first of all, I want to point out that my point about the resources, we can positively regulate for resources and we can negatively regulate for resources because resources, it is a legitimate concern that these resources have different manifestations of future problems --

THE COURT: And you can do that in the state of Minnesota all you want.

MR. CUNNINGHAM: Okay. So, if we say by -- invest in -- if, in a particular case, the Commission says there's a low cost resource, wind resource in North Dakota, it can say that's okay. And that's what I want to address. This -- if we look at -- you said it doesn't matter, it offends the Constitution because Minnesota doesn't have any coal. Well, that means we couldn't be --

THE COURT: No, I don't think that's what I said.

MR. CUNNINGHAM: Okay. I apologize.

THE COURT: I said that this statute offends the Constitution to the extent that it reaches entities in other states and regulates them there. The only harmful activity that occurs, I think we can agree, is from the generation of the coal. That is -- that is where the harm occurs. That's where the emissions occur in this industry. Right?

There is nothing harmful about the product that arrives in Minnesota. It's not a tainted food product, it's not even a fuel emission. There is nothing harmful to the citizens of the state of Minnesota by consuming electricity that was, in fact, generated in North Dakota by coal.

MR. CUNNINGHAM: Well, you're right, Your Honor, and we're not suggesting that there is anything. What we're saying is what the legislature determined the wisdom of this

is that we do not want -- we do not think it's in the public interest to rely on a resource that produces problems. It produces two problems. It produces emissions that aren't limited to the area. The atmosphere is a volatile place; those emissions go beyond the borders. They don't -- those emissions don't recognize the borders between North Dakota and Minnesota.

And second, that the resource itself is a risky commodity. That is a reasonable decision that the legislature can make --

THE COURT: Those are interests of citizens generally. Okay? Citizens around the country generally have those interests. There's nothing unique to Minnesota citizens about that, and so -- let me finish, please --

MR. CUNNINGHAM: I'm sorry.

THE COURT: And so that's why we do have federal regulatory agencies focusing directly on those interests. You're right that there is a concern. I said that from the outset. I think it's clear that there's an environmental concern, but that that is a concern whether it's air floating between North Dakota and Minnesota and Wyoming or it's the commodity concern that you raise. That is not a local interest unique to Minnesotans. That is a common interest we have in this country.

MR. CUNNINGHAM: No Court has ever said that it has

to be unique. For example, if Minnesota has a statute that is concerned about disposing of milk cartons, that has been upheld every other state -- it would apply to any other locality. It's whether it's an actual local concern, not whether it's a unique local concern but whether it's an actual local concern --

THE COURT: But because disposing of milk cartons might cause harm in this state, right?

MR. CUNNINGHAM: I understand, but your point was that it wasn't unique, and there's no requirement that it be unique --

THE COURT: I had two points. One is that electricity coming to the state is not harmful, that the harm occurs at the point of generation, unlike the many interests, local interests we have with respect to harmful products.

MR. CUNNINGHAM: Your Honor, it's not just -- it's not just the harm to the environment that's being analyzed here, it's also the harm from entering into longterm contracts for a risky commodity. That's a --

THE COURT: That's not a Minnesota unique harm. That's my only point, is that's an issue we have with coal all over this country.

MR. CUNNINGHAM: I understand. And what federalism is based on is that states are laboratories of experimentation, and my point is that the State has the right

to deal with this --

THE COURT: Well, let's focus on that, then --

MR. CUNNINGHAM: Okay.

THE COURT: -- looking at the constitutionality of it.

MR. CUNNINGHAM: All right. I would like to just put this in a context, and, believe me, I will not take an hour to get to the constitutionality --

THE COURT: You're welcome to take as long as Mr. Boyd took.

MR. CUNNINGHAM: I'm not going to. The more questions that are -- that you have that are unanswered about the operation of this statute, the more this whole case is premature.

The Public Utilities -- Mr. Boyd talked a lot about regulatory matters, a lot about how his Plaintiffs -- his clients -- do their utility business. That is something that they should bring before the Public Utilities Commission because the Public Utilities Commission has the technical analysts and structures to deal with those kind of things --

THE COURT: Is this a primary jurisdiction argument or an abstention argument?

MR. CUNNINGHAM: Actually, it's a ripeness argument. The whole point of ripeness when agencies are involved -- I'm going to quote this, it's a long quote and I apologize --

THE COURT: Well, just read it slowly.

MR. CUNNINGHAM: I will.

THE COURT: Okay.

MR. CUNNINGHAM: "The basic rationale of the ripeness doctrine is to prevent Courts, to avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

THE COURT: So you're saying to me because -- since 2007, which is now six years -- the Minnesota Public Utility Commission -- which I can understand has had a challenging time figuring out what on earth this statute means, and this case is two years old -- that I should just wait for them to figure that out, however long that takes? I don't think so. I have the power to look at the statute, on its face, and on its face to determine whether it's constitutional. And I have the power to do that now. I don't need to abstain to the agency.

MR. CUNNINGHAM: Your Honor, I was not disputing your power. I was saying that to the extent that you have unanswered questions, my goal here is to answer all your questions and make this as clear as possible --

THE COURT: But isn't that part of the challenge

here? I appreciate the struggle the State has had with this statute is that many of the interpretations, for instance, promoted in your briefing, are just that. The language itself is not, in fact, in the statute. It's a difficult statute to understand, frankly.

MR. CUNNINGHAM: You're right, Your Honor. And that's -- the Public Utilities Commission has quasi-legislative authority, and that's what sets this case off from other cases. And, in fact, in cases dealing with public agencies -- and the *MPUC versus the FCC*, it's an Eighth Circuit case, 483 F.3d 570 -- in that case, the FCC, in an order, said, if we are -- said something to the effect that, "If we are confronted with a particular fact situation, we are inclined to rule in a particular way." The Court said that wasn't ripe. Even when the agency indicated how it's going to rule, the Court determined that that wasn't ripe.

The Public Utilities Commission has the authority not only to determine, for example, who a "person" is in this statute, they have the authority to determine what "import" means and how you prove import. They have the authority to determine what "increase" means and how that's proven. They have the authority -- let's just take what Mr. Boyd was talking about about Basin and Minnkota. They're saying that it's impossible for them to satisfy the statute, and I think their goal is to have you -- is to have you determine that.

One of their -- one of the Plaintiffs' -- one of the Plaintiffs' representatives in a deposition -- we refer to this in our brief -- said this is a preemptive strike to have the Court determine what the statute means so Minnesota will be bound by it. Those aren't his exact words, but that's what's going on here: They want the Court to determine that it's impossible for Basin Electric to satisfy the statute. But my point is that's something the Public Utilities Commission could determine. And if the Public Utilities Commission determined that it was impossible for Basin Electric to satisfy the statute, then there wouldn't be any harm and we wouldn't have a case here. That's the whole point of why it's not ripe: There might not be a case here.

THE COURT: And, of course, the response to that is that the Public Utilities Commission has had six years to do that, they have not done it, there is no limit -- you're not suggesting any limit in when they may do it. And the process of delay is in their self-interest because so long as they delay, these folks can't function.

MR. CUNNINGHAM: Your Honor, Basin Electric asked for the Commission not to address the issue. One of the Plaintiffs said, "There's a lawsuit, so please don't address this issue" --

THE COURT: Because Minnesota Public Utilities Commission can't determine the constitutionality of the

statute --

MR. CUNNINGHAM: No, but they -- constitutional claims may be made, and constitutional claims are made. And if the statute is applied to them in a manner that they deem institutional, they can file a separate legal case on that basis. The reason that is important in this case is because a lot of the -- a lot of the harm, a lot of the extraterritoriality analysis is based on an absolutely false construction of this statute. This statute is not about tracking electrons. When this --

THE COURT: But you don't know what it is --

MR. CUNNINGHAM: No, I do know what it is --

THE COURT: Where in the statute does it say that -- well, go ahead. It seems clear to me that the only regulated activity that causes harm is the emission of CO2 and the generation of coal-generated electricity. And when that occurs in North Dakota or in Wyoming, then we have a problem. Now, I don't see how you can construe the statute not to pertain to that, which is, I think, what you're saying.

MR. CUNNINGHAM: Well, what I'm trying to -- well, let me give you an example. Plaintiff has said that they are obligated -- or they have wondered whether the importation -- the importation clause applies to transmitting energy across the grid, across Minnesota, not consumed in Minnesota.

THE COURT: But sometimes we don't know, do we?

MR. CUNNINGHAM: But the thing is, Your Honor, that supposes that we're measuring the electricity. We're not. Proof of this will come in contracts, will come in ownership. That's how these cases will be litigated before the Commission. And that's one of the problems that we're having here is it presupposes something that's not ever going to happen. We're not ever going to be putting volt meters on every node and determining where the electricity goes. That's not how the statute will be enforced.

It will be enforced based upon documents. So, there is no -- it doesn't have anything to do with creating a new grid, it doesn't have anything to do when MISO dispatches of electricity, it doesn't have anything to do with MISO membership, it doesn't have to do with anything to do with transmission of electricity through Minnesota. These cases are --

THE COURT: The Department of Commerce has said otherwise, haven't they?

MR. CUNNINGHAM: No, the Department of Commerce has not said otherwise --

THE COURT: Well, then you heard Mr. Boyd quote the Department of Commerce saying otherwise --

MR. CUNNINGHAM: No, I think that -- when -- this gets into minutia, but I'm afraid I have to try. When -- let's say Basin Electric bids into MISO the capacity of

coal-generated plants, along with its other plants; it has a business plan of offering a single rate that's based on a blended rate of all of its different generating facilities. That's its business plan; it's not a right.

The Commerce Clause, if there's anything that's clear from the *Exxon* case, is the Commerce Clause does not protect participants, and it does not protect business plans. That's their business plan. They could easily have a rate for Minnesota and a rate for Wisconsin. They don't want to do that. It's not impossible. But it's based on bidding their capacities into MISO, and that's not tracking electrons. That's not tracking electrons through the state. They're bidding that product into MISO for the purpose of satisfying the capacity for Minnesota.

But my point is that analysis should be done by the Public Utilities Commission --

THE COURT: Why? That's wholesale transactions, isn't it?

MR. CUNNINGHAM: No, Your Honor, that's resource use. That's what this is. This is about resource use --

THE COURT: No, you're talking about wholesale contracts. You're not talking about coal; you're talking about wholesale contracts --

MR. CUNNINGHAM: We're talking about contracts. I don't think they're determined whether wholesale or resale --

I don't know -- but the point is we are not regulating prices. We're not doing that. That's what FERC does. And I'll just bring up right now this *PPL* case. Let me read how the Court describes the issue in that case. In essence -- I'm on Page 3 of the opinion -- and I just want you to know that you don't have to write --

THE COURT: Is that the New Jersey or the Maryland opinion?

MR. CUNNINGHAM: This is the Maryland opinion, yes, and you don't have to write anything near this long because most of this is not relevant to this case. But I do want you to read what the issue was in that case: "In essence, the CFD," which is a contract for differences, "provided that, regardless of the price set by the federally-regulated wholesale market, the Maryland utilities would ensure that CBC received a guaranteed price fixed by a contractual formula."

Our case is not about prices. That's what FERC regulates. FERC regulates prices and the security of transmission. The NGA does not regulate either of those --

THE COURT: So your position then is that Minnesota, who has traditionally really regulated at the retail end, has the power to regulate terms and conditions of wholesale longterm power purchase agreements, purely wholesale, as to resources.

MR. CUNNINGHAM: We're not -- I apologize, Your

Honor. Your phraseology, regulating the terms and conditions, we're not regulating the terms and conditions. We're regulating the resource --

THE COURT: That's a term and condition of that contract, isn't?

MR. CUNNINGHAM: No, we're saying you cannot use that resource --

THE COURT: That's a condition, isn't it?

MR. CUNNINGHAM: I would say no. I would say no, that's not a term and condition of a contract. You can't use that resource. When we're --

THE COURT: Here's a contract between these two entities and you're talking about terms and conditions and rates and you say one of the conditions is you cannot use coal as a resource --

MR. CUNNINGHAM: That's in the statute. That's not a condition of the contract. That's in the statute.

THE COURT: No, but you're trying to regulate the ability of wholesale -- folks in wholesale contracts and requiring them in the context of a wholesale contract to condition the contract on not using coal.

MR. CUNNINGHAM: We are -- the state is regulating persons that are subject to the PUC. Part of the problem was -- in this case is the context of how regulation occurs is not fleshed out. Counsel for Plaintiff has identified PUC

proceedings. That's not it's going to be done. It's going to be done in Integrated Resource Plan proceedings. So, for example, on the other side, with our use of renewables, we are saying, "You've got to use renewable sources." So, in that sense, we're saying, "You must use this type of source for a certain percentage of your capacity."

That's our -- that's within our power, and certainly that displaces other sources of energy. So, in a sense, when you make an affirmative statement that you must use a resource, you are limiting the sale of the other resource. It's a zero-sum game unless you take growth into account. But, Your Honor, the -- this analysis, the Commerce Clause analysis, let's say for extraterritoriality, the extraterritoriality prong of the dormant Commerce Clause does not prohibit affects that regulation -- in-state regulation, as the Supreme Court has determined that many in-state activities that are regulated has effects on out-of-state.

For example, let's take the *Cotto Waxo* case. That was a case in which Minnesota said you cannot use -- you cannot sell cleaning products that have petroleum products in it. Now, certainly that had extraterritorial effects. People were buying those petroleum products from out of state --

THE COURT: Because they had a harm in Minnesota, right? I get back to my original point. Sure, Minnesota has the power to say, "We don't want our citizens harmed by bad

products."

MR. CUNNINGHAM: Yep. And the -- and this Court is obligated to accept the determination of the Minnesota legislature on the legislative fact of the harm caused by emissions and the potential harm caused by unstable prices. The Supreme Court has said in many different guises that the wisdom of a state legislature is not the subject for debate --

THE COURT: No, and I agree that carbon emissions, generally speaking, in the atmosphere is a serious problem for this country. But again, the electricity that comes in this state is not harmful to its citizens, but okay.

MR. CUNNINGHAM: Your Honor, the Plaintiff is able -- is obligated to show that there is a burden on interstate commerce. There is not a burden on interstate commerce in this case. The electricity will continue to flow, there will still be water, electricity brought down from Canada, there will still be wind electricity flowing from North Dakota. It does not -- it is not a burden on interstate commerce.

That's the question is whether interstate commerce is burdened, not whether Plaintiffs' business plans are harmed, and they haven't shown how this burdens interstate commerce. They haven't shown how our statute will effect a coal company -- a coal generator's ability to contract with an entity in another state. That's what the externality [sic]

cases are about. They're not about whether decisions will be effected in other states but whether it will be controlled, whether conduct that has nothing to do with the state will be controlled.

In the price cases, for example, the Court determined that because the minimum price set in State A will mean every other state has to accept that minimum price, there is no corollary for this statute. No corollary in this at all. No other state will be required to do anything, no generating plant will be required to do anything. They can contract with whomever they want outside of Minnesota. So, the externality [sic] just isn't there. Extraterritoriality, I'm sorry. It does not control what happens in other states.

It is also not discriminatory. Your Honor mentioned that we don't have coal. Well, since we don't have coal, we can't be discriminating in favor of our own coal. And that's what the Court -- that's what the Supreme Court determined in the *Exxon* case, the *Exxon versus the Governor of Maryland*. In that case, there was a regulation, a prohibition on out-of-state petroleum producers having retail stores. And they said, "Well, Maryland doesn't have any of its coal," and the Court said, well, then by definition -- "Maryland doesn't have any oil."

"Well, then by definition it can't be discriminating in favor of its oil."

Same thing: "By definition, we can't be discriminating." But if you look at the statute as a whole, it's clear that this is about the use of coal. It's not about discriminating against interstate commerce.

THE COURT: It is, as Mr. Boyd says, a resource elimination statute.

MR. CUNNINGHAM: Correct, it is. And there's no law that says in Minnesota can't make resource determinations. They have the right to make affirmative resource determinations, and they have the right to make negative resource determinations because it doesn't -- this statute does not violate the Commerce Clause. As I say, it doesn't have the extraterritoriality effect of the cases that have prohibited state statutes. If you look at the case -- at the statute, it's obvious that its goal is against coal and not against interstate interests.

As I said, electricity will continue to flow, and other forms of electricity generated by North Dakota entities will continue in interstate commerce. In fact, the coal industry continues in interstate commerce. It's just Minnesota said, "We don't want to be part of it anymore."With respect to preemption -- oh, I want to make one more comment, and that is the notion of potential conflict. There is no -- Plaintiffs have concluded that there is, but they haven't stated one state can determine that there's not going to be

renewables. I don't see that happening, but there will be no conflict.

There will be no multiplicity of standards. There is no showing that any state is bound by what Minnesota does. And that was the problem with extraterritoriality. It made other states, actors conform. This one does not --

THE COURT: It could, though. There could be conflicts between the states.

MR. CUNNINGHAM: Your Honor, I'd be happy to -- I've thought about it, and I don't know what the conflict is. It's talking about -- we're only talking about electricity consumed in Minnesota, and I assume another state would only be talking about electricity consumed in that state. So, I don't know what the conflict is. I've tried to think of what the conflicts might be, but I don't know what they are. And I think that that's speculative. And what I'm saying is if you look at the statute, it does not control what happens outside the state.

With respect to preemption, again we've got Plaintiffs making conclusions and they use the word "plainly": "Plainly it interferes with what FERC does." Well, it's not plain to me, and I don't see FERC here. FERC regulates wholesale prices, and it regulates the security of transmission, transmission standards. This --

THE COURT: It regulates all the terms and

conditions of transmission. It's beyond prices.

MR. CUNNINGHAM: Okay. Okay. Yes. And this statute does not. This statute regulates a resource, not -- otherwise all of our other -- all of our other resource statutes are infirm, and I don't think they are. I think that's something that the State has -- the State has historically had authority to protect the health and -- physical and economic health and security of its citizens. States -- courts recognize that states have traditional power in utilities, and courts are loathe -- or "loathe" might be too strong of word -- courts are sensitive to interference with that. And there's no doubt --

THE COURT: Sure, siting and construction of power plants, retail transmission, retail pricing, you're right. That's where states traditionally have had exclusive authority, but that's not what we're talking about here. There's nothing here about siting and constructing of power plants here, that at least is at issue, or retail pricing.

MR. CUNNINGHAM: Your Honor, as I said, we -- the -- certainly the sensitivity towards the conservation of resources is newer in regulation than the establishment of local rates. But it is a legitimate interest to have secure resources for the provision of local service, and that's one of the bases for this statute.

Plaintiffs have identified no way in which our

statute interferes with any FERC ability to regulate any of the things that you said. It doesn't establish prices, it doesn't deal with terms and conditions. I suppose we can differ on whether a source is a -- whether a statutory prohibition is a term and condition. I would say it's part of the statute. But for the things that FERC normally regulates, FERC specifically excludes resource planning, says states have that authority. So --

THE COURT: It's the language actually local resource planning?

MR. CUNNINGHAM: And this is a local resource plan. This is for electricity that will be consumed in Minnesota.

With respect to the Clean Air Act, the Clean Air Act statute talks about standards. The cases that Plaintiff has identified -- and the cases that Your Honor identified in your order on the dismissal motion -- pardon me -- those cases dealt with the problems that would occur if courts get in the business of establishing standards for pollutants. The courts say if you establish standards for pollutants, first of all the courts aren't -- the courts aren't prepared in terms of its resources to make the kind of economic and scientific decisions with respect to standards. And when I say "standards," I mean parts per million, I mean, standards.

The courts don't have the proper mechanism for making those decisions, and there would be the potential for

multiplicity. There would be potential that a Court in Maine would determine a standard, a Court in Vermont would determine another standard. And I'm saying parts per million. Our statute does not do anything like that. There is no possibility of multiplicity. There's no possibility of -- you don't have to make any scientific decisions about this. Plaintiffs are asking you to make regulatory decisions about this statute. I ask you that that is specifically what you should not do is make regulatory decisions. I believe that is something that is not ripe yet. The Court doesn't have to make any standards. The statute doesn't establish any standards, parts per million. The reasons why preemption is -- exists is not offended by this statute.

Words are just the skins of ideas. Our statute does not offend any of the ideas underscoring preemption, and therefore preemption shouldn't be applied. Courts are warned that there's a presumption for -- there's a presumption for the validity of state statutes and certainly in a case where even the Clean Air Act recognizes that states have a role. And you say, well, they have a role with respect to their own atmosphere.

And again I say that the atmosphere doesn't stop at the end of the -- at the borders of the state, but since we're not --

THE COURT: But the Clean Air Act addresses that

directly. It says that if this state is concerned that the bad atmosphere from North Dakota, if you will, is coming over into Minnesota, there's a procedure to go to the EPA and make that complaint. Right?

MR. CUNNINGHAM: If we were wanting to -- you're right, Your Honor, and if we were wanting to establish standards, that would be a criticism. But this statute does not establish standards. It does not establish parts per million. There is no potential for multiplicity or conflict in this statute, and that was the basis for the Courts' decisions that have been cited.

It doesn't have any requirements for a -- the hallmark of the things that would be preempted would be the establishment of standards, requirements for emission suppression technology, reporting requirements, excessive -- penalties. None of these are in this statute. None of those hallmarks that would trigger preemption are in this statute. None of the hallmarks that would trigger preemption under FERC. We don't do anything about prices or standards of transmission in this statute.

Your Honor, I'd be happy -- more than happy to answer any of your questions about how this statute works, what its intentions are and why it's a good idea, and why Minnesota is a good citizen for wanting to do this.

THE COURT: I hope you understand that this Court

completely agrees that we have an environmental issue. But this Court's focus, necessary focus on this case is the constitutionally of the statute.

MR. CUNNINGHAM: Right, and that's good. It is not on how the statute -- whether the statute is a wise one, it is not on we don't know exactly how the statute is going to operate with respect to exceptions. That is not what this case is about. This case is about whether it burdens interstate commerce and whether its actual operation is preempted by other federal laws.

THE COURT: Thank you.

MR. CUNNINGHAM: Thank you.

THE COURT: You bet.

Mr. Boyd, why don't I give you a chance to respond to that, and then we'll hear from the environmental groups.

MR. BOYD: Thank you, Your Honor. I'll try to be very specific.

First of all, I wanted to just clarify something that I meant to emphasize in an earlier -- in my earlier presentation. I promise I won't go through that whole process here, that whole presentation again, but I was making the point that subdivision 3(3) prohibits new longterm power purchase agreements with existing sources outside of Minnesota. I had been focusing on coal-fueled sources; but as the Court is aware from our briefs, the statute, in fact, in

its plain terms, prohibits longterm power purchase agreements with existing out-of-state facilities that generate any CO2 emissions. So, that prohibits longterm power purchase agreements not only where there is CO2 emissions from coal but also CO2 emissions from natural gas, some forms of biomass, and diesel.

It doesn't change the point I was making about the statute being a statute -- or a generation-source elimination statute. It eliminates -- seeks to eliminate coal fuel sources, but it's even broader in its discrimination on out-of-state interests by prohibiting longterm power purchase agreements with other forms of generation existing outside of Minnesota. And again, that prohibition on such new longterm power purchase agreements does not apply to any existing facility in Minnesota. So, it prohibits out-of-state or longterm power purchase agreements with out-of-state facilities that are fueled by coal, natural gas, biomass, and diesel without any corresponding burden on in-state facilities.

In response to some of the arguments Mr. Cunningham had made, first of all, he -- he described or he quoted the concept that states are laboratories for inventive kinds of legislation that the federal government has learned from. Well, in fact, the Clean Air Act has made it very clear that that application does not apply to the context of regulating

what are deemed to be air pollutants. And in this case, the Clean Air Act makes it very clear that, with the exception of California which is carved out of that statute, the other 49 states, including Minnesota, is not supposed to and is not allowed to be a laboratory of legislation. That's very clear under the Clean Air Act.

Mr. Cunningham indicated that the MPUC has a quasi-legislative function. That may be true in some circumstances, but that function does not apply where the language of a statute is clear and plain on its face. And it does not have the authority to declare or not declare statutes to be unconstitutional, where the statute is plain and clear on its face. Where it says, for example, "no person shall engage" in these prohibited transactions, that's plain on its face. The PUC cannot change that and rewrite it.

The legislature could have said "no public utility," as defined in the Minnesota statutes, "shall engage" in this transaction. Instead it said "no person shall." It was unqualified, it was categorical, it says what it says. It's very plain on its face. It applies to any person who participates in those activities, and the PUC does not have quasi-legislative authority to change that.

Mr. Cunningham said this statute's application will be based on documents. Those documents that he is referring to are wholesale transactional documents. That underscores

the points we've been making. The statute imposes terms and conditions on wholesale transactional activities, and he's confirmed that by saying that is what they would look to. He indicated that the statute doesn't impose any terms or conditions. In fact, that's exactly what it does. It says this transaction, this wholesale transaction, is prohibited unless you can come to the PUC and satisfy them that you can establish offsets pursuant to the statute.

That's a condition: You cannot engage in this transaction unless you offset. That's as clear of a condition as anything could be. That condition is imposed on wholesale transactions, and the Supreme Court and Congress has said that's an area that's exclusively reserved for the federal government. Mr. Cunningham indicated that we have not explained how the statute burdens interstate commerce. I think I began this morning by saying exactly how it burdens interstate commerce.

It burdens it by seeking to eliminate a generation source. It burdens interstate commerce by being a generation elimination statute, which Mr. Cunningham confirmed. This is a generation elimination statute. We're operating in a regional marketplace. The statute seeks to eliminate this generation source from the market. That burdens the interstate market.

And then lastly, Mr. Cunningham indicated that this

statute is not preempted by the Clean Air Act because it doesn't establish standards. I would respectfully agree. Again, it establishes standards very clearly. In fact, it imposes the ultimate standard. Rather than dealing with some level of parts per million, the statute says the standard will be zero. That is a standard. That may be a very heavy-handed standard, not as precise or scientific as parts per million, but that is a standard. And that is the ultimate standard. The statute imposes a zero tolerance standard -- or -- standard, and provides no way around it. The offsets, as we've established, are not available.

I believe that's all I have in response to Defendants' arguments. Thank you.

THE COURT: Thank you.

Mr. Strand.

MR. STRAND: May it please the Court, my name is Scott Strand with the Minnesota Center for Environmental Advocacy. We would like to start with Ms. Spalding who will address the bulk of the issues in the case. Mr. Donahue will then follow and particularly focus on the dormant Commerce Clause issues.

THE COURT: Very good.

MR. STRAND: All right. Thank you.

THE COURT: Ms. Spalding.

MS. SPALDING: Good morning, Your Honor. My name is

Joanne Spalding, I'm with the Sierra Club here on behalf of environmental amici. Thank you so much for allowing us to present arguments this morning and --

THE COURT: I'm just going to need you to speak up just a little bit. That comes down, if you can --

MS. SPALDING: Oh.

THE COURT: There you go.

MS. SPALDING: Great. I just wanted to thank you very much for allowing us to present arguments this morning in this case. We appreciate the opportunity.

I will be discussing the jurisdiction and preemption issues. My co-counsel, Sean Donahue, will address dormant Commerce Clause issues. And since Your Honor seems to be very interested in the dormant commerce clause, I will try to leave plenty of time for him to discuss those.

So, the Next Generation Energy Act is well within Minnesota's authority to regulate utilities. Plaintiffs mischaracterize the prohibitions in section 216H.03 to sweep well beyond the language of the statute. They make unwarranted assumptions about how the statute would apply even though the Minnesota PUC, which is charged with implementing it, has never interpreted it or applied it in the manner they suggest. In the context of this facial challenge, such a sweeping interpretation is inappropriate. Unless and until Minnesota applies a statute in the broad manner that

Plaintiffs suggest, it must be upheld if any possible reading is constitutional.

Plaintiffs rely on their overly broad reading of the statute to attempt to show that they are injured, but they have not been harmed by any requirement of the statute. And the future harm they allege is purely speculative. They, therefore, lack standing. Their challenge is also premature. It is not only unripe as Minnesota has argued, but it assumes that the Minnesota PUC will construe the statute broadly without ever asking the PUC to interpret key terms. Indeed, Basin Electric explicitly asked the PUC not to decide how key provisions could be interpreted until after this litigation concludes. But this Court should not endeavor to interpret these --

THE COURT REPORTER: Ms. Spalding, I need you to slow down.

MS. SPALDING: I'm sorry. I'm trying to let my co-counsel --

THE COURT: No, no, don't worry. Everyone will have enough time.

MS. SPALDING: All right. I will slow down then.

If the Court decides to reach the constitutional questions that the Plaintiffs have raised, it should have no trouble finding that the statute is constitutional --

THE COURT: So, let me just step back a minute.

Your argument is a ripeness argument, not an abstention --

MS. SPALDING: No, we are arguing an abstention, I was just agreeing that ripeness would also apply.

THE COURT: Okay.

MS. SPALDING: But I won't go into that since Minnesota has already done that.

In terms of whether or not the statute is constitutional, states routinely tell utilities what kind of generation they can purchase. That happens all over the country. Minnesota may constitutionally choose to purchase and use electricity with as low of CO2 emissions it can acquire, as several other states have already done, including Washington, Oregon, and California. And each of those has comparable statutes governing power purchase agreements. The citizens of Minnesota may constitutionally make that choice through legislative action, and the NGEA does not regulate beyond Minnesota's border or beyond Minnesota's constitutional authority.

With regard to standing as a preliminary matter, Plaintiffs have not demonstrated standing because they claim to be injured by the NGEA provisions related to out-of-state new large energy facilities, which is subdivision 2, as well as the provisions related to longterm power purchase agreements, subdivision 3. But the PUC has never adopted the overbroad interpretations that Plaintiffs find offensive, and

it is clear from the history of the PUC proceedings and this litigation that the PUC is highly unlikely to do so.

The Plaintiffs' allegations of possible future harm do not demonstrate concrete, actual, or imminent injury. And their efforts to determine whether or not an ambiguous statute applies are not cognizable injury. And additionally, Plaintiffs must establish standing with regard to each claim. With regard to the new power plant provisions, they have said that they originally said that they would not be able to sell power into Minnesota from plants they plan to build. We offered extensive evidence showing that those plants would not be built, and Plaintiffs have not rebutted that evidence.

So, with regard to subdivision 2, they are -- their claims are mostly related to whether or not power would enter Minnesota from some of the plants that are subject to subdivision 2, the new large energy facilities, that are out of state. And the example that they've used is with Basin Electric's uncertainty about whether the sales from the Dry Fork plant into MISO would qualify for that, but uncertainty does not create standing. Basin has been selling that power for several years now with no action from the PUC. This issue is pending before the PUC, and Basin has asked the PUC not to decide it. And Defendants have now confirmed that the statute does not apply to Minnesota purchases from MISO.

And with regard to the PPA provision, subdivision 3,

Plaintiffs claim injury from that because their concern about, for example, MRES says it can no longer consider longterm power purchase agreements that might increase statewide power sector carbon dioxide emissions.

And Basin has said that it was unable to enter into longterm power purchase agreements that were offered in response to a recent request for proposals. Plaintiffs' concerns are not well-founded. They themselves are not sure whether the PPAs would or would not implicate the Next Generation Energy Act. If, for example, you look at the Raatz Declaration on paragraph 25, it says these PPAs appear to be prohibited; it is unclear how one might determine if a particular import or transaction actually increases statewide power sector carbon dioxide emissions.

So, this is not -- this is the classic case where the PUC should decide this issue. It's not that they are not able to enter these transactions. They haven't determined whether they can enter those transactions. And no one knows for sure what "increase" means because no one has asked the PUC to define that, and it's not defined in the statute, and the PUC has therefore not defined it.

If the Plaintiffs have been injured by this provision, it is because they have chosen to interpret "increase" even though they admit they don't know what it means. This is a self-inflicted injury. Uncertainty is not

enough to create standing. If mere uncertainty over a statute were enough to create standing, then everyone automatically would be able to challenge statutes, and federal courts would be in the business of issuing advisory opinions. If the Court decides that the Plaintiffs do have standing, it should nevertheless abstain from deciding the Plaintiffs' claim.

Under *Railroad Commission of Texas versus Pullman*, which the Court can raise *sua sponte* regardless of whether the parties raise it, each of the provisions that the Plaintiffs challenge involve unsettled issues of state law. And once those are decided by the PUC, that would resolve Plaintiffs' constitutional concerns or at least substantially modify the constitutional question. Subdivision 2, for instance, the unsettled question is whether MISO transactions are included in the prohibition. Plaintiffs now say that this provision is unambiguous and the only way to construe it is it applies to MISO transactions.

But they also cite the Dairyland proceeding in which -- in that case, Dairyland, another utility, took the position advocating the opposite conclusion. That's clearly a possible interpretation of the statute. And the Defendants now have confirmed that it does not apply to MISO transactions. There is a state avenue to get this issue resolved, but Basin expressly asked the PUC to refrain from deciding it pending the outcome of this case, which is

backwards --

THE COURT: But I'm confused, didn't the Department of Commerce say it did apply to purchases from MISO markets?

MS. SPALDING: No. The Department of Commerce, appearing as an advocate in that proceeding, submitted testimony -- or submitted argument about how it could apply, but the PUC is the deciding entity. Anything that's -- that is --

THE COURT: Not under this statute. The Department of Commerce could, despite what the PUC says, go to the Attorney General and say there's been a violation of the statute.

MS. SPALDING: The power to refer cases to the Attorney General is not the power to interpret the statute. The power to interpret the statute lies with the PUC. And in the PUC proceedings, the Department of Commerce is a party to those proceedings. It's advising, but that's not the ultimate decision maker. And so the appropriate process is for the PUC to make that determination. But that -- and it was in the process of doing that when Basin said, "Please don't decide this because we're litigating it."

And I just want to get to a couple of the other unsettled questions -- unsettled and unclear areas, but one is this whole question of "increase" and what does that mean. The PUC has not decided that. And there are lots of things --

ways that "increase" could make a huge difference. If "increase" means from the 2007 baseline, for instance, there could be all sorts of power purchase agreements that the Plaintiffs could enter that would not increase statewide power sector carbon dioxide emissions because those emissions have gone down. We don't know what the baseline is, so we don't know what "increase" means and whether any of their contracts would, in fact, cause such an increase because the PUC has not decided that. So, that is -- if they have that concern, there is a process by which they could get a decision from the PUC.

And the same is true with "offsets." There's no indication that they've asked the PUC for guidance on that, and the statutory language clearly allows for a much broader range of offsets than the Plaintiffs presume. For example, they say that adding additional resources requires eliminating corresponding resources without gaining additional capacity, but that assumes that all resources have the same CO2 emissions. Coal plants can be operated more efficiently and reduce their emissions in that way and increase capacity. The same is true with natural gas plants. Wind, of course, has no CO2 emissions, so the question is --

THE COURT: Is this the CO2 capture technology that doesn't commercially exist?

MS. SPALDING: No. Coal plants can reduce their emissions -- I don't want to get into the technical side of

it -- but by the -- any -- from -- like maybe 5 to 9 percent efficiency improvements just by tuning up their plants or reconstructing parts of it. There are ways that coal plants can reduce their emissions, so there are -- so that's just within coal plants. And then, of course, there are resources that are lower carbon resources. So, you don't have to necessarily eliminate one source in order to add another.

And in the absence of a cap-and-trade system is -- the PUC could also determine what the applicability -- or the ability to rely on other states' cap-and-trade systems. But even without that, the first offset opportunity exists. So, the bottom line is that the statute is ambiguous, the Plaintiffs have a resource because there's a state avenue to resolve those ambiguities; and that would, in turn, resolve or at least substantially modify their federal claims. And so the environmental *amici* believe that the Court should abstain to give Minnesota the chance to interpret the statute in a manner that avoids these constitutional concerns.

Now, Plaintiffs have also said they would be harmed if they were not able to present those claims to the federal court until the PUC and Minnesota courts interpret it. However, the PUC proceedings, you know, as I said, they cut that off before they got a decision on at least one issue. In addition, state and federal courts have concurrent jurisdiction to decide constitutional issues, so it doesn't

necessarily have to go all the way through the state Supreme Court and then come back here. So, again, their only harm in this case is uncertainty, which is not -- is really no harm at all.

So, on -- I'm now going to turn to Clean Air Act preemption. The Next Generation Energy Act and this provision does not regulate out-of-state carbon dioxide emissions, it simply minimizes Minnesota's reliance on high CO2-emitting sources of electricity. Choosing not to purchase a product whose production results in environmental harm is entirely different from regulating the production of that product. The State does not in any way prevent out-of-state coal plants from being -- from producing electricity. It doesn't require out-of-state generators to reduce their emissions in any way. Those plants can continue to sell their power to any other state.

Plaintiffs cite the definition of "statewide power sector carbon dioxide emissions" as requiring reductions, but that is just measuring emissions for the purposes of determining what "increase" means. It has nothing to do with controlling emissions or preventing emissions. The Clean Air Act has nothing to say about what -- about choices that a state can make about what available generation resources can be used to provide power in that state. Even if the Clean Air Act were relevant, the Plaintiffs fundamentally

mischaracterize its scope. In fact, California is not so very special. Every state can adopt regulations that are more stringent than federal law allows.

And so there's no question that states can be laboratories in the clean -- in the air pollution control context. Plaintiffs rely on the provisions related to pollutants for which there is a National Ambient Air Quality Standard. Most -- and we've discussed this in our brief. Nearly every provision they cite relates to a pollutant that has a National Ambient Air Quality Standard. There are only six of those. CO2 is not one such pollutant. So, the provisions of Section 126, for instance, that Your Honor was discussing before about asking EPA to reduce emissions from a neighboring state do not apply. They are not available because it is not a pollutant for which a National Ambient Air Quality Standard exists.

It is also untrue, actually, that air pollution regulation in a state must be adopted under the auspices of the Clean Air Act. Nothing in the Act requires that. Cases on which the Plaintiffs rely invalidated state laws because they conflict with or interfere with Clean Air Act requirements, not because they are outside the scope of the act.

Plaintiffs also mischaracterize the Supreme Court's decision in *AEP versus Connecticut*. They rely entirely on one

sentence, which is this: "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon dioxide emissions from power plants." This was a decision that was made in the context of whether or not federal common law exists. Federal common law is rarely -- is rarely created by the federal courts. It's an interstitial type of law that federal courts only create in the complete absence of any other law on the subject.

And, in fact, courts will turn first to state law if there's no federal law before they create federal common law in many situations. So, it's really not -- it's very different from the plenary authority that states have to regulate air pollution. State law can only be limited by clear -- clear intent of Congress to eliminate the State's authority. Now, one of the things that --

THE COURT: The State can control -- the State has authority over air pollution in the state --

MS. SPALDING: That's correct.

THE COURT: -- but that's not what we're talking about here.

MS. SPALDING: Right. And that's why it's a little bit -- it's a little bit odd to be talking about this Clean Air Act preemption at all because it doesn't control pollution outside of the state. Those plants can emit however much pollution they want to emit that complies with the laws in

that state. And the EPA, which is charged with implementing the Clean Air Act, of course, agrees that states have this authority. So, in the -- what -- the federal court -- what the Supreme Court did in *AEP versus Connecticut* was it said the EPA has this authority under Section 111 of the Clean Air Act, which is the new source performance standards.

And, in fact, EPA is in the process of adopting new source performance standards for power plants. And that's all true. Now, EPA issued its proposed rule on September 20th, and if you look at that rule you will see that EPA actually cites -- it says -- I'm actually going to read this because --

THE COURT: Slowly, slowly.

MS. SPALDING: "Several states have also recently established emission performance standards or other measures to limit emissions of GHG from new EGU that are comparable to this proposal in this rule making." EPA then goes on to cite the 9-state Regional Greenhouse Gas Initiative which caps CO2 emissions from all fossil fuel powered planned in those states. California's SB1368, and that's the law that the NGEA, this part of the NGEA, was modeled on and that limits power purchases to plants generating less than 1100 pounds of CO2 per megawatt hour and that governs power purchase agreements. Laws to that same effect exist in Oregon and Washington state; and New York has a statute limiting CO2 emissions; California's AB32. All of these are cited in the

EPA's New Source Performance Standard rule making.

EPA also includes the list of state RPS programs, renewable portfolio standard programs, noting that currently 30 states and the District of Columbia have enforceable RPS or other mandatory renewable capacity policies, and seven states have voluntary goals. So, the entity that's charged with implementing the Clean Air Act and interpreting it under federal law has -- is, in fact, looking to these state laboratories of -- to determine -- to -- and basically using them as examples of ways in which states are, on their own, reducing CO2 emissions. And some of those statutes that EPA cites are -- do apply to power purchase agreements of power from other states into the state, like the Washington, Oregon, and California statutes.

With regard to Federal Power Act preemption, I'm just going to say briefly that this -- Plaintiffs' preemption argument again depends on accepting their overly broad interpretation of the statute. And there are alternative interpretations of the statute -- one of which is in the Declaration of Scott Hempling, it's the Defendants' Declaration and expert report -- that is a viable interpretation of the statute. It is one that the Defendants have adopted. And it is very clear that it does not -- that it is dealing with the areas that the State has traditional authority to regulate.

And I wanted to say one thing about that, as well. The fact that the -- that Minnesota has not previously regulated municipal and co-ops -- munis and co-ops, which is what these Plaintiffs are -- is just because it hasn't extensively regulated them doesn't mean that it doesn't have the authority to do so. This is a question of what is traditionally within the State's authority is -- the State can limit itself. That doesn't mean it loses that authority. And again, more than 30 states, including Minnesota, have RPS programs. By definition, those limit the sale of fossil fuel power, and the FERC has not found any infirmity with those.

And if Your Honor has any questions on those jurisdictional and preemption issues, I'd be happy to respond, and otherwise my co-counsel will address the dormant Commerce. Clause.

THE COURT: Thank you.

MS. SPALDING: Thank you.

MR. DONAHUE: Good afternoon, Your Honor.

THE COURT: Yes, I guess we're in the afternoon.

MR. DONAHUE: Yes. Sean Donahue, I represent the Environmental Defense Fund, and I'm speaking on behalf of the whole group of environmental intervenors.

I want to talk about the dormant Commerce Clause, in particular the theory of extraterritoriality that is being urged in this case, which has absolutely no support in the

doctrine, would be a radical and highly problematic departure that would, if taken seriously, condemn the laws of more than half the states of the country, including these laws that are extremely close to this one and enacted throughout the West Coast.

The extraterritoriality doctrine is very narrow, and it's articulated by the Supreme Court and the Court of Appeals cases. And we acknowledge Courts of Appeals have applied it, but it's always about states that try to regulate transactions to which they have no connection so that in *Healy*, the state is trying to regulate transactions between sellers of alcohol and purchasers in another state and say you can't charge lower than you posted in your home state. The *Cotto Waxo* case, the Eighth Circuit articulated this very clearly and said what Minnesota is trying to do in this ban on the importation or use of this product has a connection to the state. It is not telling a manufacturer that it may not transact with a citizen of a different state. That's not what's happening here. That's the limited --

THE COURT: But we have this unique situation with electricity, don't we, and we can't be certain whether the electricity is coming into Minnesota or not coming into Minnesota. And so, in fact, there may be an impact of this statute on the transmission of electricity that never comes into Minnesota.

MR. DONAHUE: Well, those are a different category. I want to distinguish between two different types of theories of extraterritoriality. The rigid one that basically says, "Well, the transmissions is occurring in another state, therefore the harm is occurring there, therefore the state can't regulate it," that's wrong. What the state is regulating is the transaction in the Minnesota market, just as the LCFS in California was regulating only California transactions. I'll get to in a moment why the extraterritoriality question in the *Rocky Mountain* case is just like the one we have here.

It was really heavily briefed in that case. The Court considered it very closely and found there was absolutely no support for this idea that, well, if the products are physically identical when they cross the border, the state may not regulate it. The extraterritoriality doctrine is narrower than that, and it doesn't apply.

Plaintiffs do say that, in fact, this law will operate to apply -- like the Basin claim that there will be a seller in one non-Minnesota state trying to reach a buyer in another and Minnesota's law will reach out and regulate and interfere with that. That is a cognizable claim under the extraterritoriality. That is the paradigm. The problem with it is there is not any reason to think, certainly for a federal court, to strike down a state law that the law will be

applied that way.

But what I'm very concerned about is the broader theory that because states do this all the time throughout the country, they tell utilities within their borders what kind of generation they may purchase, and that necessarily means whether it is purchased in state or out of state. Consider -- what the Plaintiffs here are very ambitiously asking this Court to rule is to give coal an immunity from state regulation so that if a state wants to say, "We want to use renewable generation utilities," you must -- as many RPSs say, "you must supply some percentage of your power that you supply to your customers must be renewable." They would say, "Well, if the renewable generation occurs out of state, that's out-of-state activity." That's -- you can't look at that under dormant Commerce Clause doctrine. The electrons are fungible and identical. That theory just can't be right.

And, of course, the doctrine -- there is a massive nexus between Minnesota, at least the paradigm case, not the parade-of-horrible cases involving two other states. The Court can decide if those are plausible and if it's appropriate to make that determination. But the paradigm case where Minnesota is saying you are entering into a longterm contract to provide power to customers that's going to be consumed in Minnesota, that is the nexus, that is ample, that is exactly what the Court in the *LCFS* case. I want to quickly

note that the extraterritoriality issue, that was exactly the same because the Court suggested that maybe the fact that the fuel was burned in California distinguishes that case.

But what California found was that different forms of ethanol actually have the same tailpipe emissions but may have very, very different actual consequences for global warming because some of them, considering their whole life cycle of how they're produced, have very high emissions and some very low. So, if ethanol is produced using high emissions generation in an inefficient way, it will have higher life cycle emissions than ethanol that is produced more efficiently. And the Court said it is permissible for California to assign deferential regulatory treatment to those two physically identical products based on the life cycle emissions where --

THE COURT: Because they are coming into California and harming its citizens. It starts the opinion by saying, "This has harmed our environment and it has harmed our business" --

MR. DONAHUE: In exactly the same way that would be the case here --

THE COURT: No harm here --

MR. DONAHUE: The emissions in California are the same. They're burning fuel, and --

THE COURT: In California.

MR. DONAHUE: Right, but the California regulation takes into account life cycle emissions that happen in Iowa and in Brazil, and that was the whole controversy. And that's -- and the Court looked at it and said that there is a nexus to California because it only regulates fuel sales in our market but considering the full carbon impact of the use of that fungible and identical fuel is permissible, there's nothing on extraterritoriality --

THE COURT: But what is the nexus when there is no harm in the state? This is all about Minnesota reaching out and saying --

MR. DONAHUE: This is about saying every state that engages in integrated resource planning does, when it favors some forms of generation. Minnesota -- there's no basis to tell Minnesota that it may not rationally conclude that Minnesota demands should not be subsidizing a form of power that is harmful to Minnesota and to the planet and that may, given federal regulatory developments and other factors, may prove unstable in the long run. It's the financial support. That's -- and the Court's harm prong to extraterritoriality doesn't have a support in the cases.

The cases say --

THE COURT: It's the nexus. It's the nexus --

MR. DONAHUE: Yeah, and the nexus is very clear --

THE COURT: But typically it's the nexus to harm in

the state, a local interest in the state --

MR. DONAHUE: But there is a -- as all of these states, all the RPS states -- California, Washington, and Oregon -- that have enacted similar provisions for longterm contracts have concluded that providing support for high emissions forms of energy is a cognizable interest, is a serious interest. There is not -- if this were a statute about trying to regulate carbon emissions in another state, there would be emissions standards that would say no North Dakota power plant may emit more than X tons per year. That's not what it is. This is no Minnesota utility that may purchase certain forms of power that we deem to be environmentally and economically and otherwise problematic.

That is a power that, I would submit, is established and clear that FERC has repeatedly recognized that the EPA, as Counsel noted, has recognized. FERC says states have the authority to dictate the generation and resources from which utilities may procure electric energy. This goes on, and the reason it's not -- and it has to be -- I would point out it's been commented that some RPSs -- and, Your Honor, I think raised Judge Posner's decision or dicta in the *Illinois Commerce Commission* case --

THE COURT: I think it was Easterbrook, and so I think Posner would take great offense --

MR. DONAHUE: Is it? You may be right. I think it

was --

THE COURT: Or maybe it might have been a different Seventh Circuit case --

MR. DONAHUE: Both of them were my professors and were very beloved, but Judge Posner sometimes speaks freely about things in the course of reaching a decision.

But the issue there was one that has been raised about many RPSs which is a decision that favored in-state generation, in-state renewable projects. That's discrimination, arguably, and that's problematic. But the requirement to use clean power wherever it's generated is not discriminatory, and the idea of using the dormant Commerce Clause to strike that down because if the generation is out of state, then you're prescribing how a generation out of state may occur would completely override the State's ability to do resource planning in this area. And it's something states are doing and nobody has -- I mean, this is a -- you know, well argued and impressive argument, but it's really, really out there.

And the general version, the specific version that says you're really regulating transactions between two different non-Minnesota states, I fully agree that is a claim that fits within the doctrine. And the question is: Is it a real concern about this statute? And for reasons both of my co-counsel have said, we think it's speculative and not --

but, you know, I -- my real concern is the broader theory that the only relevant harm is one in another state, there's no nexus to Minnesota, because I think that's really wrong under the cases; really problematic for energy policy. That's really become quite well-rooted; and that, you know, federal agencies, if they believe it's problematic, have ample authority to step in. And they haven't.

So, again, I mean, I think if you look at cases like *Healy*, *Cotto Waxo*, there just isn't -- and the Ninth Circuit, again, looked at this in a massively briefed case with tons of *amici* and parties and so forth and said it could find no authority for this principle that was urged in that case, that regulating sales -- regulating contractual relationships with California sales into California is tantamount to trying to regulate activity in another state. And the Court said there's no support in the extraterritoriality cases, there's nothing in the California regulatory regime, just as there isn't in Minnesota's that purports to regulate transactions between two out-of-state parties. And the fact that the power -- the resources we're talking about here are being used in Minnesota's market is a very robust and traditionally recognized nexus that's more than enough to oust the doctrine.

I haven't addressed discrimination. I think it's implausible to say that this is a protectionist statute, that it's protecting some local industry. I think it's a good

faith, you know, resource planning and environmental statute. I think the arguments, you know, the *Exxon* case where the only affected parties were outside of Maryland, the *Cotto Waxo* case, also the fact that the parties that may be most burdened are out of state is not discrimination if there is some legitimate basis other than origin for the distinction and the fact that coal generation produces a lot more emissions than other forms of generation is a basis that's legitimate and has been adopted in many, many other jurisdictions.

So, unless the Court has any questions about that, I'm really eager to engage about extraterritoriality because I believe that it's a point on which the Court would not get it right if it followed some of the lines of argument that are being offered here. And I'm happy to discuss it more, but I'm also aware that we've been here a long time and happy to stand down, as well.

THE COURT: Well, you've done a marvelous job. Let me ask you about these other statutes in Washington, Oregon, and California. If I were to match them up with the Minnesota statute, which I will do, would they be precisely the same, or does Mr. Boyd make a point about the over-breadth of the Minnesota statute, particularly the phrase "no person shall"?

MR. DONAHUE: Right, I'm sure they wouldn't be the same --

THE COURT: They would be the same?

MR. DONAHUE: They would not be the same. There are going to be differences --

THE COURT: Meaningful differences?

MR. DONAHUE: And my co-counsel is going to know the statute better than I do. I know the California one, the structure is similar: Longterm contracts, doesn't matter where the generation is and, you know -- and the goal is reducing reliance on high emissions sources. So, that's -- the -- so I would say if we're talking about a broad version and a narrow version of the extraterritoriality, this fundamental idea that you can't, even in doing resource planning, take into account the type of generation, if it occurs in another state, which is really radical, that idea is clearly rejected in the Pacific Coast statutes and in all the RPS statutes that more than half the states have adopted.

These other arguments that parts of the language -- parts of the statute are very problematic and unclear and we don't know how they apply and they may apply in ways that are really burdensome or troubling, I'm sure there will be significant differences. And I don't think we're claiming that, for example, you know, PUC constructions of those statutes would necessarily carry over to fill gaps in how this statute is applied. It's the basic structure.

THE COURT: And has the constitutionality of those statutes been challenged?

MR. DONAHUE: The -- I think in California there was some talk of challenging -- no. There's not been a court challenge, no. And the RPS, there have been court challenges. There was -- but they have -- the ones that have gotten any purchase so far have been about these provisions that favored in-state. And, you know, that's -- there's some tension between the extraterritoriality theory that says the state line is sacrosanct, the State can't take into account the type of generation if it occurs out of state. Well, if the State, in a national -- or at least regional electricity market, if the State can't take into account the type of generation that occurs if it occurs out of state, the State can't effectively take into account the type of generation anywhere because electricity is fungible and imports -- apparently their view is that coal-generated power sort of has an immunity from state regulation.

And I'm sure the State could try to regulate -- directly regulate emissions, but there's effectively nothing they could do about procurement, which is just a very different animal from regulation, as we've tried to urge -- from emissions regulation.

THE COURT: Thank you very much.

MR. DONAHUE: Thank you.

THE COURT: Mr. Boyd.

MR. BOYD: Thank you, Your Honor. I'll try and be

brief and very focused.

THE COURT: It's been suggested that you are urging a radical -- I have to say Mr. Boyd doesn't typically do that but --

MR. BOYD: It would be very out of character.

THE COURT: Yeah, it would be out of character.

MR. BOYD: I do not believe that we are proposing anything radical. I think if there was something radical, it was the terms of the legislation that Minnesota enacted in 2007. I've been intrigued by the way in which the statute has been alternatively referred to as a run-of-the-mill resource planning statute on the one hand, but then other times referred to as the "product of creativity from the State legislative process." I imagine that it's more of the latter.

The Minnesota legislature trying to be creative, trying to achieve whatever its objective was. And as I've stated and I believe is clear, the objective was to eliminate coal as a resource in this country and certainly in this regional area. But what they were doing was something that was novel, it was beyond what they had done before. The fact that there may be some states on the Pacific Coast that may have had similar ideas or objectives does not mean this law is constitutional. As Counsel indicated, those laws have not been challenged. I think there was a reference to a California law in the briefs, but these other state statutes

were not referred to. There's been discussion about the resource planning statutes that have been enacted around the country; those are the subject of ongoing litigation. It cannot be suggested to this Court that you can just assume that those are appropriate resource planning statutes, that it's a foregone conclusion. But again, as I've said earlier, we're not attacking the RPS in this case. 216H.03 is materially different from the RPS statutes. It's different because it's eliminating a resource.

RPS statutes, resource planning statutes, they may encourage diversification, diversifying capacity. That doesn't mean that coal goes away. Coal provides reliable power. Wind is available when the wind blows; it's not reliable. So, adding wind to capacity doesn't eliminate coal. This statute, its purpose on its face is to eliminate coal as a resource in this market.

Going back to some of the points that were made at the beginning of the *amici's* presentation, I wanted to make sure that the Court was aware of what's in and what's not in the record. Counsel was suggesting that, in fact, perhaps it is possible to satisfy the PUC on these offset requirements and then went on and talked about certain technologies and so forth. That's not in the record. The Defendants have not provided any rebuttal to the Plaintiffs' concrete evidence establishing that the offsets are not available. And

Mr. Hempling, who was referred to by the *amici*, in fact acknowledged that he was not asserting that the offsets were available. He was assuming they were not available.

The Plaintiffs' Declarations establish that they've experienced harm and continue to experience harm as a result of this statute. It prevents them from engaging in transactions relating to their resource portfolio for all of their members. Plaintiffs have established the 216H.03 offset requirements are not available, and Plaintiffs have established -- and this too is unrebutted -- that attempting to seek advance approval of any transaction that is otherwise prohibited is effectively a prohibition.

Mr. Raatz, Mr. Wahle, and Mr. Tschepen have all submitted supplemental Declarations explaining in detail how that is not feasible. For the *amici* to come in, people who are not in this business, and postulate without any record support, sure, these businesses can go in and ask the PUC or try and convince the DOC that this transaction is okay. That is not evidence, that's not record [sic], and that's not plausible. The people who know about how this business runs, how this energy market operates are Mr. Tschepen, Mr. Wahle, and Mr. Raatz, and they've all submitted unrebutted Declarations explaining why that's not feasible.

Counsel also indicated that this statute doesn't apply to the MISO energy market purchases. In fact, the

Department of Commerce stated that it did, and it does in the Dairyland proceedings. And you've heard people describe that -- the MDOC's statements in the Dairyland proceedings are in the record and available to the Court. And I think we even have a big block quote in our brief setting forth exactly what the DOC said. The Defendants in their discovery responses also admitted that the statute applies to MISO transactions, and that too is in the record.

Counsel referred to one of the Defendants' experts, Scott Hempling, as providing an interpretation of the statute. He purports to surmise how he thinks it might work. Frankly, it's an effort to salvage what he hopes to salvage out of this statute, but it's essentially a -- an impression that he has as to how this -- the legislature might achieve its goal. It's not based on the plain language. And, frankly, I don't know that the Defendants have adopted Mr. Hempling's interpretation. I know that sounds strange since Mr. Hempling is the Defendants' expert, but they've been very clear to say they don't take a position on what this statute means.

With regard to the department -- or excuse me, the dormant Commerce Clause, I think the argument was that this statute is limited in its application to only regulating Minnesota co-ops, which I think was intended to mean load-serving entities located in Minnesota actually serving retail customers, so, for example, the co-op in Olivia,

Minnesota. In fact, as the Court has noted, the statute says "no person shall." So, this isn't a statute that's just limited to prohibiting a coop in Olivia, Minnesota from entering into a longterm power purchase agreement with a facility in South Dakota. It says "no person shall," and it applies to Basin in Bismarck, Minnkota in Grand Forks, and MRES in Sioux Falls.

That's the breadth of this statute, and to argue that that kind of extraterritorial regulation is somehow radical is, frankly, implausible. And to argue that declaring this statute to be unconstitutional will bring the demise to all resource planning statutes is likewise implausible. Those statutes encourage diversity. This statute encourages and requires the absolute elimination of a resource. And those resources are located outside of the state and, if eliminated, would be eliminated with respect to the entire regional market. That is unconstitutional.

That's all I have, Your Honor. Thank you.

THE COURT: Any response either by the State or by the *amici*?

Yes, Mr. Cunningham.

MR. CUNNINGHAM: Thank you, Your Honor. I'll try to be brief and to the point.

I'll start off with the last things that were said, which is we, the members of the PUC and the Department of

Commerce, did not identify how the statute works with respect to their Plaintiffs. Well, that's true. The Department is a litigant in front of the PUC. The PUC is a decision maker. How are they going to get together and litigate the Public Utilities' case against -- or with the Plaintiffs? That's a fundamental problem in this case.

THE COURT: Except that the statute again identifies the Department of Commerce, and the Department of Commerce hasn't expressed a view on the breadth of the statute. And there's nothing to preclude them from going to your office and saying, "Enforce our view."

MR. CUNNINGHAM: But that doesn't mean that the Public Utilities Commission has adopted that view in this case, nor does it mean that a Court would adopt that view --

THE COURT: No, but it doesn't preclude that --

MR. CUNNINGHAM: No, it doesn't. But could I just -- I will also address this whole MISO thing. Nobody has said that simply because energy will be dispatched by MISO, that alone triggers the NGEA. Nobody has said that. The fact that it applies to capacity bid into MISO, yes, it does apply to that, or it could. It could apply to that.

THE COURT: There you go.

MR. CUNNINGHAM: But that's all -- that's -- when the capacity is bid into MISO, that's the entity saying, "We are using coal plants to serve Minnesota ratepayers" --

THE COURT: Maybe, maybe not.

MR. CUNNINGHAM: No, it's true. They bid into MISO the capacity necessary to serve their customers. That's what we're talking about. They're bidding into MISO the capacity to serve their customers in Minnesota.

THE COURT: I understand that.

MR. CUNNINGHAM: And if they bid in a coal plant to serve their Minnesota customers, that could trigger a -- the application of the statute --

THE COURT: But MISO, as I understand it, doesn't correlate purchaser and seller. So --

MR. CUNNINGHAM: No, it's the fact that they're -- it's the fact that they are contracting for that and bidding it in. That's the proof. That's the proof under the statute. If it ever is applied, that's the proof. That will be how it was done, not whether electricity that MISO was transmitting came from a particular plant, because that cannot be tracked. But the Public Utilities Commission in the first place has the technical expertise to sort these things out, but you can't just glibly say that it applied to electricity in MISO or it doesn't. MISO transmits electricity. It's bid into it through contracts.

THE COURT: And you're telling me that this statute, in the State's view, applies to out-of-state entities' bidding capacity into MISO.

MR. CUNNINGHAM: Bidding capacity to serve their Minnesota ratepayers, yes.

THE COURT: My understanding is you can't do that --

MR. CUNNINGHAM: Oh, yeah, you can.

THE COURT: It's bidding a capacity to serve the region --

MR. CUNNINGHAM: No, no, they're submitting capacity to serve their customers. That's what they're doing.

Mr. Boyd said that he talked about burden on interstate commerce. Well, he didn't. He talked about problems that his own Plaintiffs have. That's not a burden on interstate commerce. Interstate commerce is indifferent to the participants and their business plans. He was talking about standing. I understand, but it's not the same as the burden on interstate commerce.

Let's talk about this subpart 3 very briefly. If you look at subpart 3, the one about "There shall not be longterm contracts," it's not limited by its terms to just out-of-state. And Mr. Boyd said, "Well, if you're in-state and the plant is already in existence, there will never be an increase." Same thing applies to an out-of-state. If it's in -- if it's in production, there will be no increase.

If it's a new plant, well, the Minnesota state law says you can't have a new plant, so it is symmetrical with respect to in-state. In fact, Plaintiffs have never

identified any power plant that is treated differently inside -- from those inside Minnesota or owned by Minnesota interests or those outside. In order to show that discrimination, they've got to show one that's similarly situated treated differently.

Finally, Counsel glibly said that we have established a standard and the standard is zero. No. Power plants who use coal, wherever they are, are free to do whatever they have -- whatever they want without any emissions controls.

Thank you.

THE COURT: Thank you.

Yes, Mr. Donahue.

MR. DONAHUE: Thank you. I will leap at the opportunity, but I didn't mean to suggest Mr. Boyd was radical. I --

THE COURT: I know. He was mostly teasing you --

MR. DONAHUE: He is an effective advocate. I meant to suggest that the argument is radical --

THE COURT: And I appreciated that.

MR. DONAHUE: I'll just address one of his points in response to ours, trying to distinguish the RPS. I don't think he's distinguished; he's explained how -- the broad theory of extraterritoriality that any consideration of generation, if it occurs out of state, constitutes regulating

that generation and is impermissible. He hasn't distinguished the RPS because the extraterritoriality doctrine is very strong medicine. It's not a matter of degrees if something is extraterritorial or not. There's no balancing. It's per se invalid.

And so the fact that an RPS -- and, of course, some RPSs, like California is I think 30 percent. It's quite robust and it will mean using less coal and using less natural gas ultimately. So, it does have -- you can't increase the percentage of RPS without decreasing other, you know, fossil fuels. And there's no problem distinction of how you save those if you adopt their strong version of extraterritoriality.

The argument that this statute is about trying to eliminate coal, eliminate reliance on coal, I first want to say, you know, where is the constitutional principle, where is the federal statute that forbids a state from enacting a policy that it wants to eliminate reliance on any particular fuel? There isn't one, I would submit. At best, that argument is an argument about burden on interstate commerce. It would be analyzed under *Pike*. It would be -- it would face a heavy burden because the Court basically has, you know -- *Pike* balancing gives a lot of deference to the policy interest and the fact that particular firms may be adversely affected doesn't equate to unconstitutionality.

And then I would just close again with pointing to the *LCFS* decision because I think the extraterritoriality issue was really fully vetted and briefed there, and I think it's directly applicable here.

THE COURT: Thank you.

MR. DONAHUE: Thank you.

THE COURT: Have I heard everyone out? Is there anyone else who wishes to be heard? Very good.

Well, very well briefed, fascinating issue. Very well argued. The Court will take it under advisement. Court is adjourned.

Oh, you know what, we have -- I knew I was going to forget this motion. Would anybody have any objection to my considering it on the papers? It's pretty straightforward and --

MR. BOYD: That's fine with us, Your Honor.

MR. CUNNINGHAM: Agreed.

THE COURT: Okay. Thank you. Court is adjourned.

(WHEREUPON, the matter was adjourned.)

* * * *

CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter

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