UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc.,	No.: 11-CV-3232 (SRN/SER)
Plaintiffs,	**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
v.	
Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, J. Dennis O'Brien, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity,	
Defendants.	

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INTRODUCTION

Minn. Stat. §216H.03 far exceeds Minnesota's traditional and constitutional authority to regulate in-state "public utilities." Instead, the statute reaches beyond Minnesota's borders to impose prohibitions and restrictions on out-of-state entities and out-of-state wholesale power transactions. Minn. Stat. §216H.03's extraterritorial regulation of and interference with interstate commerce have harmed Plaintiffs Basin Electric Power Cooperative ("Basin"), Minnkota Power Cooperative, Inc. ("Minnkota"), and Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services ("MRES") by regulating and restricting their resource planning and by limiting the types of long-term power purchase agreements available to serve their region-wide, multi-state memberships.

Minn. Stat. §216H.03 has also hindered development of out-of-state energy projects promoted by Plaintiffs North Dakota Industrial Commission, North American Coal Corporation ("North American Coal"), and Great Northern Properties Limited Partnership ("Great Northern")—projects that would operate using cleaner and more efficient technologies. By declaring that "no person shall…import or commit to import" to Minnesota any power from any "new large energy facilities," §216H.03 renders these otherwise viable regional generation projects economically infeasible. This, in turn, reduces the generation resources available to supply power within the interconnected, interstate region of which Minnesota is only a part.

In addition to its improper extraterritorial effects, §216H.03 is also protectionist. It disfavors use of out-of-state coal for power generation; grants in-state projects and in-state interests an inordinate share of statutory exemptions; and imposes prohibitions and burdens on long-term power purchase agreements with out-of-state generation facilities that do not apply to in-state generation facilities.

Minn. Stat. §216H.03's extraterritorial regulation and interference with interstate commerce violates the Dormant Commerce Clause, and is also preempted by the Federal Power Act ("FPA") and the Clean Air Act ("CAA"). For these reasons, Defendants' Motion for Summary Judgment should be denied.

GENERAL BACKGROUND

A. Minnesota's Traditional Regulation Of Minnesota Utilities Does Not Permit Extraterritorial Regulation Of Out-Of-State Businesses And Out-Of-State Generation Sources.

Minn. Stat. §216H.03 is not a legitimate extension of Minnesota's authority to regulate Minnesota retail utilities. In fact, the statute far exceeds any authority granted under state law or permitted by the U.S. Constitution. To make their case, Defendants overstate the scope of Minnesota's prior "traditional" regulatory authority and understate the expansive scope of §216H.03.

1. Minnesota's Traditional Regulation Has Been Primarily Limited To "Public Utilities" Providing "Retail" Service.

Defendants argue that "Minnesota extensively regulates utilities to enable Minnesota businesses and individual consumers to have access to reliable, stable, and affordable energy" and that "[t]his regulation is designed to ensure that businesses and residential customers are provided adequate and reliable service at reasonable rates." (ECF 130 at 2-3) To support this assertion, Defendants cite several Minnesota statutory provisions. (*Id.* at 2) Most of the statutes Defendants cite relate to Minnesota's regulation of "public utilities." *See, e.g.,* Minn. Stat. §§216B.16, 216B.48-.51, 216B.05.

Under Minnesota law, "public utilities" are defined as "persons, corporations, or other legal entities…operating, maintaining, or controlling ***in this state*** equipment or facilities for furnishing ***retail*** natural, manufactured, or mixed gas or ***electric service*** to or for the public or engaged in the production and ***retail sale*** thereof." *Id.* §216B.02, subd. 4(1)(emphasis added). The definition of "public utility" expressly excludes "municipalities and cooperative electric associations." *Id.* Under Minnesota law, municipalities and cooperative electric associations are self-regulated unless they choose to be regulated by the Minnesota Public Utilities Commission ("MPUC"). *See id.* §§216B.025-.026. Thus, Minnesota's traditional state authority to regulate "public utilities" does not grant Minnesota unlimited authority over all utilities that are in any way connected to the generation, transmission, or sale at wholesale of power that is ultimately consumed in Minnesota.

Minnesota law requires utilities to file integrated resource plans ("IRPs") with the MPUC. However, the MPUC's authority to take action on IRPs differs based on the type of utility that files the IRP. The MPUC "shall approve, reject, or modify the plan of a public utility, as defined by section 216B.02." In contrast to its authority over "public utilities," the MPUC's determinations as to the IRPs filed by municipalities and cooperative electric associations "shall be advisory" only. *Id.* §216B.2422, subd. 2.

Minnesota investor-owned utilities ("IOUs") such as Xcel—which are vertically integrated in terms of generation, transmission, and retail sale—are "public utilities" subject to Minnesota's "traditional" regulation. Thus, Minnesota has traditionally had the ability to "approve, reject, or modify" their planning. However, the MPUC's authority to regulate cooperative electric associations and municipalities is very different in that the MPUC has no authority to actually "approve, reject, or modify" the planning by the entities that are not "public utilities." The limits in the MPUC's authority in this regard reflect the differences in how these different types of utilities operate and engage in resource planning.

2. Unlike Public Utilities, Retail Municipalities And Cooperatives Have Traditionally Joined Or Entered Into Contractual Arrangements With Larger Multi-State Entities That Procure Resources For Them.

Whereas vertically integrated IOUs (i.e., "public utilities") enter into their resource obligations directly, most retail cooperatives and municipalities must join with other similar entities to pool their collective resources and obtain efficient and economic access to generation resources. (Suppl. Raatz Decl. ¶4, Suppl. Tschepen Decl. ¶4) These smaller retail cooperatives and municipalities commit to long-term membership agreements or contractual relationships with regional, member-owned generation and transmission organizations ("G&Ts") who, in turn, conduct resource planning and acquire portfolios of generation resources for the collective benefit and service of the membership. (Suppl. Raatz Decl. ¶5, Suppl. Tschepen Decl. ¶5) G&Ts operate on a regional basis and often have members located in multiple states. (Suppl. Raatz Decl. ¶6, Suppl. Tschepen Decl. ¶6) Moreover, they engage in the planning and wholesale acquisition of reliable, low-cost power for the collective benefit of ***all*** of their members.

(*Id.*) The members are all required to make long-term commitments to purchase wholesale power from the regional organization and they all pay a common rate for that power. (*Id.*)

Basin and Minnkota are G&T cooperatives headquartered in North Dakota. They have long-term agreements with each of their members (some of whom are located in Minnesota) to serve those members' wholesale power supply requirements. (Suppl. Raatz Decl. ¶9, Suppl. Tschepen Decl. ¶9) Basin and Minnkota, respectively, purchase generation assets and enter into power purchase agreements to supply wholesale power to serve their respective members in multiple states. (*Id.*) Basin and Minnkota—not their individual members—are financially responsible for making the decisions regarding whether to purchase or develop a particular generation asset and whether to enter into a particular power purchase agreement. (Suppl. Raatz Decl. ¶10, Suppl. Tschepen Decl. ¶10) Basin and Minnkota—not their individual members—are the entities that "import or commit to import from outside the state power from a new large energy facility" and "enter into long-term power purchase agreements." (Suppl. Raatz Decl. ¶11, Suppl. Tschepen Decl. ¶11) And Basin and Minnkota have not "traditionally" been subject to regulation by Minnesota with respect to these activities. (Suppl. Raatz Decl. ¶12, Suppl. Tschepen Decl. ¶12)

MRES is a municipal power agency based in South Dakota and has a long-term contractual relationship with Western Minnesota Municipal Power Agency ("WMMPA"), as well as other entities located throughout a four-state region, for the purpose of providing wholesale power to more than 60 municipalities. (ECF 143, ¶3)

MRES and its member municipalities have entered into long-term power supply agreements, and MRES charges each of its member municipalities a common rate for the wholesale power it supplies. (Suppl. Wahle Decl. ¶¶5-7) MRES and WMMPA regularly engage in transactions to purchase power generation assets and/or long-term power purchase agreements to supply MRES's members. (*Id.* ¶10) It is MRES—not its individual municipality members—that "import[s] or commit to import[s] from outside the state power from a large new energy facility" and "enter[s] into long-term power purchase agreements." (*Id.* ¶12) And MRES's resource planning decisions directly affect the common rate that its members pay for the wholesale power MRES is obligated to supply each member. (*Id.* ¶7)

Thus, entities like Basin, Minnkota, and MRES conduct their resource planning activities on a regional basis in a region that includes integrated transmission systems and integrated markets spanning multiples states' borders. (Suppl. Raatz Decl. ¶13, Suppl. Tschepen Decl. ¶13) They assemble their respective resource portfolios to satisfy their obligations to serve ***all*** their members across multiple states in the most reliable and cost-effective manner. (*Id.*) Their activities are undertaken for the collective benefit of their members on a region-wide basis—not a state-by-state basis—and their decisions directly affect the common rates that their respective members pay for wholesale power across their entire multi-state membership. (*Id.*)

Given how these multi-state entities are structured, and given the nature of electricity, it is simply not possible for the entities to plan for or treat their Minnesota members differently, or for these entities to separately provide "Minnesota-approved" power to their Minnesota membership. (Suppl. Raatz Decl. ¶14, Suppl. Tschepen Decl. ¶14) Thus, by imposing prohibitions on the use of coal-generated power sources, §216H.03 regulates the manner in which Basin, Minnkota, and MRES can serve their members in all states—not just Minnesota. (*Id.*) This is a substantial leap from Minnesota's traditional regulation of "public utilities" providing "retail service" under Minnesota law.[1]

B. Minn. Stat. §216H.03's Plain Language Demonstrates That It Far Exceeds Minnesota's Traditional Regulatory Authority Over "Public Utilities" and "Retail Service."

Minn. Stat. §216H.03 clearly exceeds Minnesota's traditional authority to regulate "public utilities" and "retail service." Indeed, the plain language of §216H.03 stretches Minnesota's regulation of carbon dioxide emissions well beyond its borders. The statute purports to regulate resource planning decisions made by entities (like Basin, Minnkota, and MRES) who are located outside Minnesota and serve membership outside Minnesota, and interferes with the development and operation of electric generation facilities located outside of Minnesota.

[1] Defendants and the Environmental Groups similarly misstate traditional state regulatory authority when pointing to Renewable Portfolio Standards ("RPS") as "proof" of traditional state authority to regulate the wholesale power purchases by Minnesota-based entities. (*See* ECF 130 at 2,4) This logic is flawed for several reasons. First, no state-imposed RPS has actually survived a constitutional challenge. Indeed, RPS are a relatively recent phenomena that are only now receiving constitutional scrutiny. *See, e.g.*, Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 Va. J.L. & Tech. 89, 102-09 (2012). The Seventh Circuit recently suggested that Michigan's RPS was unconstitutional. *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (2013). Of course, the validity of any state's renewable portfolio standards or other statutes likely depends on the particular statute at issue, but the mere existence of RPS proves nothing.

Minn. Stat. §216H.03 could not be broader in imposing its prohibitions and restrictions through its express terms. It states that ***"no person shall"*** engage in activities and transactions that Minnesota has defined as increasing "statewide power sector carbon dioxide emissions." *Id.* §216H.03, subds. 2&3 (emphasis added). It could have stated only that "no public utility, as defined by section 216B.02, subd. 4, shall" engage in the prohibited activities and transactions—but it does not. There is no language limiting the statute's reach to only those transactions in which a "public utility" is a party, nor is there language limiting the NGEA to transactions in which only "Minnesota utilities" are parties. As a result, §216H.03 applies to out-of-state entities such as Basin, Minnkota, and MRES. And, as noted, it is Basin, Minnkota, and MRES—not their individual members—who "import or commit to import from outside the state power from a new large energy facility" and "enter into a long-term power purchase agreement."

Nor does §216H.03 limit its application to just those activities occurring in Minnesota or uniquely effecting Minnesota. Instead, it applies to any increase in "statewide power sector carbon dioxide emissions" which is defined 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."*** *Id.* §216H.03, subd. 2 (emphasis added). Thus, the statute applies even when the generation activities and associated emissions all occur outside Minnesota. As written, the statute applies to innumerable transactions occurring outside Minnesota before the power is actually "imported" into Minnesota for purposes of contributing to "statewide power sector carbon dioxide emissions."

Consider transactions typically undertaken by Basin. Generally, Basin has contracts with its members stating that Basin will provide energy to its members as needed. The contracts do not identify the source of the energy, nor do the contracts identify a particular mix of generation sources. However, for entities within the MISO footprint, Basin will generally supply these entities with purchases from the MISO market. Separately from these purchases, Basin enters into energy and capacity contracts on a region-wide basis to satisfy its load obligations across multiple states. These contracts will typically be between Basin and non-Minnesota generation facilities. Basin may also transfer power from its Dry Fork facility in the Western Interconnection to the Eastern Interconnection through a D.C. tie near Rapid City, South Dakota. Separately, Basin may offer energy into the MISO market at various locations outside of Minnesota. (ECF 140, ¶¶6-11)

Based on the MDOC's interpretation of the NGEA (as detailed below), all these out-of-state activities, to the extent they involve carbon-emitting generation sources, are subjected to or affected by the NGEA because they impact the total mix of resources available to serve Basin's membership, and because Basin has some Minnesota members. Consequently, some pro rata share of every transaction undertaken by Basin must be allocated to Minnesota and considered an "import" under the NGEA. Thus, the NGEA plainly regulates extraterritorially.

C. MDOC's Interpretation of Minn. Stat. §216H.03 Has Confirmed The Expansive Extraterritorial Nature Of The Statute.

Contrary to Defendants' argument, §216H.03 is not an economic regulation intended to ensure the lowest cost power to Minnesota consumers—far from it.[2] The clear purpose of Minn. Stat. §216H.03, as reflected by its plain language, is to regulate carbon dioxide emissions associated with electricity generation, even when the generation and emissions occur entirely outside Minnesota and even when these transactions involve out-of-state parties entering into transactions in other states. This is not a figment of Plaintiffs' imagination or some wild interpretation of §216H.03. Instead, this is exactly what the statute says, and it is exactly how the MDOC has interpreted it.

Specifically, in MPUC proceedings involving Dairyland Power Cooperative ("Dairyland") and Basin, respectively, the MDOC illustrated how §216H.03 applies to out-of-state G&Ts' resource planning decisions and obligations—including those resource planning decisions and transactions intended to serve member co-ops located outside Minnesota. Moreover, the MDOC applied the NGEA to these planning decisions and transactions without any evidence that more coal power is actually consumed in Minnesota as a result of these activities.[3]

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[2] Far from even suggesting its purpose is to enhance reliability or reduce consumer costs, the statute's exclusion of generation that has traditionally been the lowest cost source of energy, and its imposition of costs to offset emissions associated with this type of generation, necessarily results in less reliability and higher costs.

[3] Defendants and the Environmental Groups try to downplay the significance of the positions taken by the MDOC because the MPUC has not ruled on or accepted these interpretations. However, both the MDOC and the MPUC have the independent authority to report entities to the Minnesota Attorney General for violations of the

First, the MDOC indicated that Basin's transfer of power from its Dry Fork facility in Gillette, Wyoming—a "new large energy facility" under §216H.03, subds. 1&3(2)—from the Western Interconnection to the Eastern Interconnection triggers §216H.03. (ECF 140, Ex. B.) It is undisputed that: (1) Basin transferred this power to the Eastern Interconnection solely to serve its North Dakota customers; and (2) the transfer had nothing to do with any increased consumption in Minnesota. (*Id.*, Ex. C.) Moreover, Basin advised the MPUC and MDOC that "Basin Electric believes that [it is] highly unlikely that the physical power generated in Wyoming ends up in Minnesota and thus, there would be no violation of Minnesota Statutes 216H.03." (*Id.*) Yet the MDOC continued to challenge the transfers as violations of Minn. Stat. §216H.03, and demanded Basin explain how it intended to comply with the offset requirements imposed by the statute. (Suppl. Boyd Decl. Ex. AA) Basin provided further information. (*Id.* Ex. BB) But rather than approving Basin's Dry Fork transfers, the MDOC has remained silent—presumably waiting for this Court to decide this case.

Second, the MDOC further confirmed §216H.03's expansive application when Dairyland—which is based in Wisconsin and serves members in Minnesota, Wisconsin, Iowa, and Illinois—acquired an ownership interest in the Weston-4 Coal-Fired Power Plant ("Weston-4") in Wausau, Wisconsin. Weston-4 is a "new large energy facility" under §216H.03. Dairyland has power plants much closer to Minnesota than Weston-4. Due to the proximity of those power plants, and given the majority of Dairyland's

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NGEA. Minn. Stat. §216H.03, subd. 8. Thus, the possibility that the MPUC and MDOC may disagree about the application or interpretation of the NGEA is cold comfort.

members are in Wisconsin and Weston-4 is located in central Wisconsin, it is doubtful that energy generated by Weston-4 is ever actually imported into Minnesota. But §216H.03 nonetheless prohibited Dairyland from relying on Weston-4 to serve its members across multiple states because some of Dairyland's members are located in Minnesota. Since Weston-4 was included in Dairyland's generation resources and because Dairyland has some members in Minnesota, without an exemption Dairyland would have needed to demonstrate satisfactory carbon offsets—even though the energy generated by Weston-4 is not necessary to serve Minnesota members and is not, in fact, consumed in Minnesota. (*See* ECF 137 at 16-18; ECF 138, Exs. M-O)

The Basin and Dairyland proceedings demonstrate how broadly §216H.03 applies to prohibit and restrict transactions involving generation resources in other states, even when those transactions are to serve members that are not even located in Minnesota. The statute prohibits any and all "persons" from engaging in transactions that would "import or commit to import from outside the state power from a new large energy facility" or "a new long-term power purchase agreement" if these transactions would impact "statewide power sector carbon dioxide emissions" as defined by the statute. *Id.*, §216H.03, subds. 3(2)&(3). So, the statute is triggered when Basin, Minnkota, or MRES acquires an interest in a new large energy facility, or becomes a party to a long-term power purchase agreement to supply their respective interstate membership with wholesale power merely because Basin, Minnkota, or MRES have Minnesota members. Thus, §216H.03 regulates and limits the activities that member-owned entities like Basin, Minnkota, and MRES can undertake when determining how they will serve their region-wide, multi-state obligations.

D. The Plain Terms Of Minn. Stat. §216H.03 Confirm The NGEA's Purpose Is To Extraterritorially Regulate Emissions In Other States, Not Reduce Energy Costs to Minnesota Consumers.

Defendants contend the legislative history of §216H.03 demonstrates an intent to protect Minnesota consumers from the speculative costs that might be imposed through federal regulation of carbon emissions from coal-powered generation facilities. (ECF 130 at 4-9) But Defendants are engaging in revisionist legislative history.[4] In fact, the only *legislative findings* or *legislative judgments* the Minnesota Legislature made with respect to Minn. Stat. §216H.03 are those contained in the plain language of the statute itself, which expressly identified "global warming" and "climate change" while saying absolutely nothing about improving cost, reliability, stability, and accessibility of power for Minnesota's businesses and individual consumers. Ignoring what the statute itself says and does, Defendants instead selectively cite to fragments of the legislative debate which are not representative of the true legislative motivations.

[4] Defendants similarly engage in revisionist history to the extent they imply that the Minnesota Chamber of Commerce ("Chamber") supported §216H.03. (*See* ECF 130 at 9) The Chamber was simply indicating that it hoped to work with the Legislature to come up with a sensible bill, not that it supported the impractical NGEA. (ECF 132, Ex. 1 at 49-56) Indeed, the Chamber later participated in a successful effort in 2011 to have the Legislature repeal §216H.03 (Governor Dayton ultimately vetoed the bill) and has sought leave from the Court to file an amicus brief in this action. (ECF 150&151-1) Defendants also erroneously imply that Otter Tail Power, MRES, or Great River Energy supported §216H.03; their testimony makes clear that each entity explicitly testified against the moratorium on new coal plants. (See ECF 132, Ex. 1 at 33-34, 37-39, and 40-42)

In fact, the predominant theme espoused by legislators and supporters of the statute was the imposition of an environmental policy disfavoring large coal-generated power—a resource that Minnesota does not possess—while favoring generation from renewable sources like wind and other small dispersed generation units—which Minnesota can exploit. For example, Representative Rudd (one of the bill's primary authors) explicitly stated that "[b]asically what this section says is that we do not want any new coal burning power plants to be built. So we don't. . .want to purchase their power until they have a way to offset their emissions." (Gutierrez Decl., Ex. 1 at 5-6)

Additionally, the NGEA (of which §216H.03 was only a part) plainly demonstrates a desire to enhance Minnesota's in-state generation at the expense of out-of-state generation. Article 4 of the Act—the article immediately preceding the provisions discriminating against coal power—obligated Minnesota electric utilities to participate in a study of "the potential for dispersed generation projects [i.e. projects with capacity of 10 to 40 MW] ***that can be developed in Minnesota.***" 2007 Minn. Laws Ch. 136, Art. 4, Sec. 17 (emphasis added). Article 4 also established a "C-BED Advisory Task Force" whose purpose was to consider ways in which to advance Minnesota's community-based energy development (C-BED) projects. *Id.*, Sec. 19.

Lest there be any doubt, Defendants' contentions are further belied by the extensive exemptions that the Legislature included in the statute. Minn. Stat. §216H.03, subds. 5-7. The sheer number of these exemptions, which are heavily weighted in favor of projects located in Minnesota and/or owned by Minnesota interests, hardly reflect an intention for Minnesota to become less reliant on carbon dioxide emission generation sources that might be the subject of federal regulations.

The statute will not reduce costs, but instead will necessarily add to the costs of potential federal regulations by imposing the costs of offset requirements over and above any federally-imposed costs. Minn. Stat. §216H.03, subd. 4. These state-imposed costs would presumably be passed on to consumers, who would be the same parties bearing the costs imposed by the federal regulations that the Minnesota legislators supposedly anticipated. This demonstrates that there was no legislative intent to reduce consumer costs and, frankly, it is difficult to imagine how eliminating the lowest cost generation sources, or increasing the costs of those generation sources, could enhance reliability and reduce costs for Minnesotans.

Finally, if the objective was to protect Minnesota businesses and individual consumers from the potential increase in the costs of coal-generated power in the future, then (apart from being counterproductive) §216H.03 would be superfluous because the interstate wholesale markets such as the MISO Markets are already designed and equipped to favor the least-cost alternatives. (ECF 137 at 7-8; ECF 138, Ex. A at ¶¶22, 30-36; ECF 143 at ¶¶9-16) If the threat of federal regulations, or the ultimate imposition of such federal regulation, is going to increase the costs of coal-generated power, then those costs will be reflected in these interstate markets. If coal-generated power is no longer among the least cost alternatives due to these regulatory costs, then the market will have the effect of reducing and/or eliminating those forms of generation. Those market systems already exist to address reliability and low-cost objectives.

ARGUMENT

I. PLAINTIFFS HAVE SATISFIED THE STANDING AND RIPENESS REQUIREMENTS TO CHALLENGE MINN. STAT. §216H.03.

A. Plaintiffs Have Standing And The Controversy Is Ripe.

Defendants and the Environmental Groups claim Plaintiffs lack standing to challenge the NGEA because Plaintiffs cannot show an "injury-in-fact." (ECF 130 at 14-16; ECF 157 at 9-10) However, they advocate an incorrect legal standard that would require Plaintiffs to identify a specific lost sale or a specific purchase agreement that did not materialize due to the NGEA. (ECF 130 at 15) This "specific instance" standard is not supported by the law and when the correct standard is applied, it is clear Plaintiffs have standing.

To have standing: "(1) there must be 'injury in fact' or the ***threat of 'injury in fact'*** that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly traceable to defendant's challenged action; and (3) it must be likely (as opposed to merely speculative) that a favorable judicial decision will prevent or redress the injury." *Gray v. City of Valley Park*, 567 F.3d 976, 984 (8th Cir. 2009)(citations omitted)(emphasis added); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Stated differently, "to establish they have standing to sue, plaintiffs must show they have suffered some actual or threatened injury fairly traceable to the challenged conduct of the defendants that is likely to be redressed by a favorable decision." *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 426 (8th Cir. 1988)(internal quotation and citations omitted).

Defendants do not argue that the alleged injury is not fairly traceable to the NGEA, nor do they argue that a favorable decision will not prevent or redress the injury. (ECF 130 at 14-16) Thus, the only issue is whether Plaintiffs have demonstrated a sufficient "injury in fact." They plainly have.

As previously described, the extraterritorial prohibitions and restrictions imposed by §216H.03 have limited the ability of interstate member-owned entities like Basin, Minnkota, and MRES to acquire and use generation assets or enter into certain types of long-term power purchase agreements to serve their membership in there multi-state regions. (ECF 140, ¶12; ECF 142, ¶9; ECF 143, ¶21) For example, MRES can no longer consider long-term power purchase agreements that might "increase statewide power sector carbon dioxide emissions." (Suppl. Wahle Decl. Ex. 1) Similarly, Basin was unable to enter into long-term power purchase agreements that were offered in response to a recent request for proposals. (ECF 140, ¶25) And the value of Minnkota's surplus power has been reduced because §216H.03 limits the wholesale terms on which Minnkota can sell this surplus. (ECF 142, ¶13) The MDOC already decided that Basin's operation of the Dry Fork facility in Wyoming to serve its members in northwestern North Dakota implicates §216H.03. (ECF 140, ¶¶20-24) This creates similar problems with the acquisition of power from other entities that could be deemed to "contribute to statewide power sector carbon dioxide emissions."

Minn. Stat. §216H.03 has also stunted out-of-state generation resource developments such as the ALE project that North American Coal is developing in North Dakota, and the South Heart project that would use Great Northern's coal in North

Dakota. Parties that develop and operate such projects are exposed to the risk that power generated from those resources will be deemed by Minnesota to have contributed to Minnesota's "statewide power sector carbon dioxide emissions." Consequently, §216H.03 has impacted the viability of these projects which would otherwise be available to serve the region's—not just Minnesota's—energy needs. (ECF 139, ¶4; Dewing Decl. ¶5)

These actual harms and threats of harm establish both standing and the existence of a ripe controversy under Eighth Circuit law.[5] *See Jones v. Gale*, 470 F.3d 1261, 1265-67 (8th Cir. 2006)(rejecting argument that plaintiff lacked standing to challenge regulation under commerce clause because he did not have actual contracts with out-of-state entities); *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591-92 (8th Cir. 2003)(holding parties had standing to challenge state constitutional amendment on Dormant Commerce Clause grounds even though it had not yet been enforced); *see also Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 836 F.Supp.2d 933, 937 (D.S.D. 2011)("Damage to a business interest can also be sufficient injury for standing purposes."); *Nat'l State Bank of Elizabeth, N.J. v. Smith*, 591 F.2d 223, 239 (3d Cir. 1979)("The threat of economic harm to National State through the competition of City Trust establishes in part the requisite injury for standing.").

[5] Notably, under Eighth Circuit law, standing for one plaintiff is sufficient to establish subject matter jurisdiction. *See, e.g., Sierra Club v. United States Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011); *Hazeltine*, 340 F.3d at 592. Defendants previously acknowledged that standing for one is standing for all. (Apr. 12, 2012 Hr'g Tr. 41-42, 46-47)

Plaintiffs need not be prosecuted under an unconstitutional regulation to have standing to challenge it. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973)(allowing doctor to challenge no-abortion statute despite no actual or threatened prosecution); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968)(allowing teacher to challenge no-teaching-evolution statute even though there was no evidence that anyone had been prosecuted under it); *Gray*, 567 F.3d at 982-87 (injury in fact requirement met even "absent a specific threat of enforcement" and citing numerous cases in support); *Jones*, 470 F.3d at 1265-67; *Hazeltine*, 340 F.3d at 591-92; *United Food*, 857 F.2d at 425-30 (allowing picketers to challenge statute even though none had been arrested under it because future protests might be constitutional, yet violate the statute). Nor must Plaintiffs point to a specific lost sales opportunity to have standing. *See Alliance for Clean Coal v. Miller*, 44 F.3d 591, 594 (7th Cir. 1995)("[T]he showing of specific lost opportunities is neither required to establish standing nor reasonably expected under the circumstances of this case."). All that is required is a "statute [that] clearly applies to the plaintiff" and a "plaintiff [that] has stated a desire not to comply with its mandate." *Gray*, 567 F.3d at 985 (citations omitted). That is exactly the case here and accordingly Plaintiffs have standing to challenge §216H.03.

B. The Court Should Not Abstain.

The Environmental Groups (but not Defendants) argue the Court should abstain from deciding this case pursuant to the *Pullman* abstention doctrine. (ECF 157 at 10-12) "*Pullman* abstention presupposes two conditions: (1) there must be an unsettled issue of state law, and (2) there must be a possibility that the state law determination will moot the federal constitutional question raised." *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1126 (8th Cir. 1982)(citations omitted). "*Pullman* abstention is limited to uncertain questions of state law because 'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984)(citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

Courts "retain[] the discretion whether or not to abstain." *Synagro-WWT, Inc. v. Rush Twp.*, 204 F.Supp.2d 827, 834 (M.D Pa. 2002). Among the most important considerations for abstention are the risk of delay and additional expense that inevitably result from a federal court's decision to abstain. *See Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83-84 (1975); *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F.Supp.2d 844, 851 (N.D. Ill. 2000); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997)("Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court.").

The Court should not abstain here for at least two reasons—one legal and the other practical. First, there does not exist, and the Environmental Groups have certainly not presented, any plausible interpretation of §216H.03 that would alleviate Plaintiffs' constitutional concerns. §216H.03's violations of the Commerce Clause and Supremacy Clause are apparent on the face of the statute—there is simply no reasonable statutory interpretation that could moot the constitutional issues raised by Plaintiffs. *See Nat'l City*

Lines, 687 F.2d at 1126 ("The challenged provisions of the state acts are clear on their face and not susceptible of being construed in a way that would render it unnecessary to examine their impact on the purposes of the [federal regulation]."); *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 889 (9th Cir. 2011)(noting that federal courts should decline to abstain under *Pullman* when there was "no apparent saving construction" for the state regulation at issue).

Second, even if the Environmental Groups had presented a plausible constitutional reading of §216H.03, the Court should not abstain because of the deleterious impact it would have on the parties. Tellingly, Defendants themselves do not argue that the Court should abstain, perhaps in recognition of the substantial efforts that both sides have put forth through discovery and briefing. Additionally, the planning required for developing new large energy facilities and negotiating long-term power purchase agreements unconstitutionally affected by §216H.03 is not conducive to long, drawn-out administrative proceedings in which environmental groups intervene and pick apart each proposed project and transaction. (Suppl. Wahl Decl. ¶¶14-15; Suppl. Raatz Decl. ¶¶19-20; Suppl. Tschepen Decl. ¶¶19-20)

As the Environmental Groups readily admit, if Plaintiffs could not seek redress in this Court now, Plaintiffs would have to litigate the application of §216H.03 for interpretations by the MPUC, MDOC, the Minnesota Attorney General, a Minnesota state district court, the Minnesota state appellate court, and conceivably the Minnesota Supreme Court, all before Plaintiffs could present these constitutional issues to this Court. Such an outcome would satisfy the Environmental Policy Groups because they undoubtedly enjoy the status quo which has handcuffed Plaintiffs to inaction regarding new generation resources and long-term power purchase agreements. (*Id.*) But abstention would prejudicially delay, likely for years, Plaintiffs' right to a decision regarding §216H.03's constitutionality. For these reasons, *Pullman* abstention is inappropriate.

II. MINN. STAT. §216H.03 VIOLATES THE DORMANT COMMERCE CLAUSE AS A MATTER OF LAW.

Minn. Stat. §216H.03 plainly and purposefully interferes with the flow of goods in interstate commerce. Indeed, it is difficult to imagine how any state law that includes the words "no person shall…import or commit to import from outside the state" could survive a Dormant Commerce Clause challenge. Minn. Stat. §216H.03 is triggered by activities impacting "statewide power sector carbon dioxide emissions" which the statute defines to include emissions occur entirely outside the state of Minnesota, even though the method of generation has absolutely no effect on the character or nature of electricity "imported" or "consumed" in Minnesota.

A. Minn. Stat. §216H.03 Is *Per Se* Invalid Because It Violates The Extraterritoriality Doctrine.

A state statute "that directly controls commerce occurring wholly outside the boundaries of a State…exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). If a state law attempts to regulate beyond that state's jurisdiction and "control conduct beyond the boundary of the state," then the law is invalid *per se*. *Id.* at 336-37. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the

State." *Id.* (citing *Brown-Forman Distillers Corp v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). A statute that regulates extraterritorial commerce is *per se* invalid under the Dormant Commerce Clause. *Am. Beverage Ass'n v. Snyder*, 700 F.3d 796, 807 (6th Cir. 2012). §216H.03 regulates business decisions and activities extraterritorially. Therefore, it is unconstitutional.

Defendants argue that Minn. Stat. §216H.03 does not prevent the construction and/or the operation of any coal-generation facility outside of Minnesota. But if the purpose of the statute was solely limited to regulating the occurrence of these activities inside Minnesota, then §216H.03, subd. 3 would have stopped with provision (1) which prohibits the construction of a new large energy facility within Minnesota. Of course, §216H.03, subd. 3 does not stop there. Instead, the statute goes on to prohibit transactions involving power that is generated outside of Minnesota. As a result, member-owned entities like Basin, Minnkota, and MRES are restricted in their ability to acquire generation assets and enter into long-term power purchase agreements to serve their inter-state membership because §216H.03 will be deemed to apply. This is exactly how the MDOC has interpreted the statute with respect to: (1) Basin's use of its Dry Fork facility in Wyoming to serve its members in northwestern North Dakota, and (2) Dairyland's acquisition of an interest in Weston-4 in Wisconsin to serve its members in Wisconsin.

Minn. Stat. §216H.03 also necessarily "forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another," causing the statute to "directly regulate[] interstate commerce" in violation of the extraterritoriality doctrine.

Brown-Forman, 476 U.S. at 582. Specifically, by defining certain activities that variously contribute to Minnesota's "statewide power sector carbon dioxide emissions," the statute requires offsets for those "statewide power sector carbon dioxide emissions" through the illusory offset requirements imposed by Minn. Stat. §216H.03, subd. 4, or forego the activity altogether. Proponents like Plaintiffs would need to establish to the MPUC's "satisfaction" that they have achieved a corresponding "permanent, quantifiable, verifiable, [and] enforceable" offset "that would not otherwise have occurred" through either the reduction of an existing facility's emissions—if that were even possible and could ever make any economic sense—or the purchase of carbon dioxide allowances from a carbon dioxide cap and trade system operated by a state or group of states—should Minnesota ever establish or otherwise decide to participate in such a carbon dioxide cap and trade system.

Here, there can be no doubt that the NGEA regulates extraterritorially. So instead, the Environmental Groups argue that the extraterritoriality doctrine only applies to "price control or price affirmation statutes," citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003). (ECF 159 at 13) However, in *Pharmaceutical Research*, the Supreme Court held that a state law imposing a rebate requirement was not a price control or price affirmation statute as the petitioner in that case had argued. That is different than holding that the Dormant Commerce Clause no longer prohibits extraterritorial regulation except with respect to price control or price affirmation statutes.

On the contrary, the Supreme Court's jurisprudence has set forth the scope of the extraterritorial doctrine in broad terms and courts have continued to apply the doctrine beyond price control or price affirmation statutes. This is illustrated by a recent Sixth Circuit case, decided after *Pharmaceutical Research*, which analyzed product labeling restrictions under the extraterritorial doctrine while relying on *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) and *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). *See Int'l Dairy Foods Ass'n v. Boggs,* 622 F.3d 628, 645 (6th Cir. 2010). Indeed, courts have recently noted "the growing number of circuits that have 'considered this trendy third test' to the Commerce Clause." *Teltech Sys. Inc. v. Barbour*, 866 F.Supp.2d 571, 575-77 & n.3 (S.D. Miss. 2011), *aff'd*, 702 F.3d 232 (5th Cir. 2012)(quoting *In re Nat'l Century Fin. Enter. Inc.*, 755 F.Supp.2d 857, 878, 888 (N.D. Ohio 2010)). Several circuits refer to "extraterritorial control" as the third part of their dormant Commerce Clause test—economic protectionism and *Pike* balancing being the first two. *See Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 942 (8th Cir. 2009); *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009); *KT&G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008); *Cloverland–Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261–63 (3d Cir. 2006). Other circuits have expressly recognized the extraterritoriality principle. *See, e.g., Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007); *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010), *vacated on other grounds sub nom. IMS Health Inc. v. Schneider*, 131 S.Ct. 3091 (2011).

And, finally, courts have continued to strike down a variety of different types of statutes on extraterritoriality grounds since *Pharmaceutical Research* was decided. *See*

Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 666-69 (7th Cir. 2010)(invalidating Indiana credit code provision because it governed "activity that occurred in another state"); *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 103-04 (2d Cir. 2003)(striking down Vermont law that regulated internet due to its extraterritorial reach); *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.,* 755 F.Supp.2d 857, 888 (S.D. Ohio 2010)(holding "blue sky" law violated extraterritorial doctrine when applied to transactions occurring wholly outside the state); *Se. Booksellers Ass'n v. McMaster,* 371 F.Supp.2d 773, 787 (D.S.C. 2005)(invalidating South Carolina internet obscenity law because of extraterritorial reach); *Pepsico, Inc. v. Marion Pepsi-Cola Bottling Co.,* No. 00-229-GPM, 2003 WL 22594235 at *7 (S.D. Ill. July 18, 2003)(holding Illinois law violated extraterritorial doctrine because it had "the practical effect of controlling conduct which occurs outside of this State" and required party to "tailor its commercial activity outside of Illinois to the Illinois regulatory scheme").

Notably, the Eighth Circuit has never suggested that the extraterritoriality doctrine is limited to only price control and price affirmation statutes in those cases in which it has analyzed the extraterritoriality branch of the Dormant Commerce Clause. *See, e.g., Grand River Enters.,* 574 F.3d at 943-44; *S. Union Co. v. Missouri Public Serv. Comm'n,* 289 F.3d 503, 507-08 (8th Cir. 2002). In *Cotto Waxo Co. v. Williams,* the Eighth Circuit confirmed that "[u]nder the Commerce Clause, a state regulation is *per se* invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." 46 F.3d 790, 793 (8th Cir. 1995)(citing *Healy,* 491 U.S. at 336). "The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders." *Id.* The Eighth Circuit applied these principles to evaluate the validity of a Minnesota law that prohibited the sale of petroleum-based sweeping products. *Id.* at 792 n.1.[6]

Defendants' reliance on *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 110 (2d Cir. 2001) is misplaced because the record in that case showed that out-of-state lamp manufacturers could have modified their production and distribution methods to differentiate between lamps that would be sold in that state and those that would not be sold there. *Id.* at 110. Notably, the court distinguished the effects of that statute from state restrictions on interstate transporters where "[t]ransporters are forced to abide by state rules or avoid the state entirely" such that they "would necessarily be impeded if they chose the latter course in their efforts to conduct commerce with the surrounding states because they were unable to pass through the regulatory state." *Id.* at 111-12.

Basin, Minnkota, and MRES cannot separately distribute certain "kinds" of power to their Minnesota members. This requirement impedes their ability to serve their other members in surrounding states. In contrast to lamps which can be distributed in a manner that complies with the in-state concerns regarding the disposal of its hazardous contents,

[6] The statute in *Cotto Waxo* did not violate the extraterritoriality doctrine because the plaintiff was "able to sell to out-of-state purchasers regardless of [its] relationship to Minnesota." *Id.* at 794. As such, that statute differed from the practical effects of Minn. Stat. §216H.03 because Basin, Minnkota, and MRES cannot supply their out-of-state members with a resource portfolio including certain generation sources because of the "relationship to Minnesota." Likewise, the statute analyzed in *Southern Union* is distinguishable from §216H.03 because that Missouri law only applied to "public utilities" serving retail consumers in Missouri. 289 F.3d at 507-508.

power does not lend itself to such targeted distribution. Nor is there any justification to require such directed distribution based on the character or quality of the power itself. By defining "statewide power sector carbon dioxide emissions" to include "all emissions of carbon dioxide from the generation of electricity imported from outside the state," §216H.03 is plainly regulating a purely fungible good based on the activities that occurred entirely outside of Minnesota. This is the epitome of extraterritorial regulation.

The Environmental Groups cite to the Ninth Circuit's recent opinion in *Rocky Mountain Farmers' Union v. Corey*, No. 12-15131, 2013 WL 5227091 (9th Cir. Sept. 18, 2013), to support their contention that §216H.03 does not violate the extraterritorial doctrine of the Dormant Commerce Clause. (*See* ECF 157 at 13) Plaintiffs disagree with the holding, but in any event, the case is distinguishable. There, the Ninth Circuit was dealing with the California Fuel Standard which is materially different from §216H.03 in important ways. Among other things, the California Fuel Standard did not prohibit the sale of any particular fuel or blend of fuel. *Rocky Mountain*, 2013 WL 5227091 at **3-5. Minn. Stat. §216H.03, on the other hand, categorically prohibits imports of power from new large energy facilities and long-term power purchase agreements from carbon dioxide emitting generation sources. Additionally, the California statute regulated a materially different product—ethanol—which, unlike electricity, can be tracked from production to import to consumption. Ethanol is physically transported by trucks and boats; it is not injected into a regionally interconnected system such that California's regulation of ethanol materially alters or impacts the sources and costs of the ethanol available to residents of other states. Thus, any reliance on *Rocky Mountain* in this case is misplaced.

B. Minn. Stat. §216H.03 Is *Per Se* Invalid Because It Discriminates Against Out-Of-State Interests And Favors In-state Interests.

Apart from the stark and deliberate extraterritorial regulatory effects of Minn. Stat. §216H.03, the statute also expressly and necessarily disfavors out-of-state interests without imposing the same burdens on Minnesota.

1. Minn. Stat. §216H.03 Discriminates Against Out-Of-State Coal Interests.

The statute clearly and expressly discriminates against electricity generated by coal. Minn. Stat. §216H.03, subd. 1, 3(2),&3(3).[7] Yet, Minnesota does not produce any coal used to generate electricity. (ECF 138, Ex. U, Resp. to RFA No. 5) As a result, the effect of the statute is to disadvantage the out-of-state owners of coal reserves, coal suppliers, and coal producers, such as Plaintiffs North American Coal and Great Northern, that provide coal for electricity generation. This is not merely a matter of "reduced demand or a shift in market conditions" as Defendants blithely suggest. (ECF 130 at 23) Instead, the adverse effects of §216H.03 on the coal industry, including entities such as Great Northern and North American Coal, are entirely one-sided and occur entirely outside of Minnesota.

[7] Minn. Stat. §216H.03, subd. 1 and 3(2) prohibits importation of power from "large new energy facilities" which are effectively defined as coal-generation facilities. Minn. Stat. §216H.03, subd. 3(3) prohibits long-term power purchase agreements that result in any carbon dioxide emissions, which would include natural gas as well as coal-generation. Thus, Minn. Stat. §216H.03 discriminates against out-of-state interests in this regard, too, because Minnesota does not supply natural gas.

2. Minn. Stat. §216H.03 Favors In-State Interests Through Statutory Exemptions.

The statute also disproportionately favors in-state interests in the form of exemptions. Minn. Stat. §216H.03, subds. 5-7. Virtually all of these were exemptions for particular energy facilities that are either located or proposed to be located in Minnesota and/or in which Minnesota-based entities were owners:

- The steel production plant located in Nashwauk, Minnesota, exempted per §216H.03, subd. 5.
- The Mesabi Nugget facility located near Hoyt Lakes, Minnesota, exempted per §216H.03, subd. 6.
- Excelsior Energy's Mesaba Energy Project, proposed for Northern Minnesota, exempted per §216H.03, subd. 7(1).
- The Big Stone II project, of which Minnesota-based Otter Tail Power had been the lead developer, exempted per §216H.03, subd. 7(1),(2).
- A new large energy facility or power purchase agreement for the benefit of a Minnesota utility, exempted per §216H.03, subd. 7(3).
- The Spiritwood Station owned by Minnesota-based Great River Energy, exempted per §216H.03, subd. 7(4).[8]

Such use of exemptions to favor in-state interests constitutes in-state favoritism that is prohibited by the Dormant Commerce Clause. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265-67 (1984)(holding that statute imposing tax on liquor, but exempting liquor made from products indigenous to that state, violated Commerce Clause); *see also W. Lynn Creamery v. Healy*, 512 U.S. 186, 190-91&198 (1994)(state law that charged fee on all milk sold in the state and redistributed those fees to in-state milk producers was

[8] (*See* ECF 14, ¶¶65-68; ECF 16, ¶¶47-50; ECF 138, Ex. U at 15-17; Ltr. by Crum to Boyd, at p.7)

unconstitutional because it effectively exempted local producers at the expense of out-of-state producers)(citing *Bacchus* and the "other cases of this kind" which are "legion").

In contrast to those in-state interests favored by the statutory exemptions, non-exempt parties face the uncertain challenges of demonstrating they will offset carbon emissions to the MPUC. Minn. Stat. §216H.03, subd. 4. These offset requirements are neither practical nor feasible.

First, there would be little sense to bring a new generation source on line to increase capacity only to then have to offset the new source by permanently eliminating an equal amount of capacity from some other existing facility. *Id.* subd. 4(b)(1). Second, there is no cap-and-trade system from which to acquire carbon dioxide allowances because Minnesota has yet to either establish or participate in such a cap and trade system. In effect, these offset requirements are not actually available. *Id.* subd. 4(b)(2). And even if they were, there is no practical way in which to analyze the potential costs of achieving these offsets to the MPUC's satisfaction. So, while in-state interests have been favored with statutory exemptions, out-of-state entities such as Basin, Minnkota, and MRES must comply with illusory offset requirements in the event they are deemed to have violated any of the prohibitions imposed by §216H.03.

3. Minn. Stat. §216H.03 Favors Existing In-State Generation Sources And Discriminates Against Existing Out-Of-State Generation Sources.

Minn. Stat. §216H.03 also inherently favors in-state interests and disfavors out-of-state interests with respect to long-term power purchase agreements with existing energy facilities. Subdivisions 3(1) and 3(2) prohibit power from new large energy facilities that "*contribute* to statewide power sector carbon dioxide emissions" whereas subd. 3(3) prohibits long-term power purchase agreements that "*increase* statewide power sector carbon dioxide emissions." Minn. Stat. §216H.03, subds. 3(1),(2),(3)(emphasis added). Thus, while prohibiting the importation of power from all new large energy because they will "contribute" to the statewide power sector carbon dioxide emissions, the statute selectively prohibits only those long-term power purchase agreements that would "increase" statewide power sector carbon dioxide emissions. Long-term power purchase agreements with in-state generation sources that are already operating do not "increase" Minnesota's existing "statewide power sector carbon dioxide emissions." Thus, long-term power purchase agreements with in-state generation facilities using coal, natural gas, biomass, and diesel that were already operating and generating carbon dioxide emissions at the time the statute's prohibitions went into effect are not prohibited because, by definition, these transactions will not increase "emissions from the generation of electricity within the state." This is not the case for long-term power purchase agreements for power from out-of-state generation facilities which will be prohibited and exposed to the uncertain costs of offset requirements if they are deemed to increase "emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota."

Accordingly, parties can enter into long-term power purchase agreements with existing ***in-state generation facilities*** that are fueled by coal, natural gas, biomass, and diesel, without any risk that they might be exposed to the onerous and uncertain costs of complying with the statutory offset requirements. (*See, e.g.*, Suppl. Boyd Decl.

Exs. Y-Z) In contrast, parties have no such comfort when they enter into long-term power purchase agreements with ***out-of-state generation facilities*** that are fueled by coal, natural gas, biomass, and diesel, since it is virtually impossible to conceive of a situation where such a long-term power purchase agreement with an out-state facility would not be deemed to result in an "increase" in statewide power sector carbon dioxide emissions of at least some amount. Consequently, §216H.03, subd. 3(3) gives existing in-state generation facilities that are fueled by coal, natural gas, biomass, and diesel, a distinct advantage over out-of-state generation facilities. As a result this disparate treatment that prohibits only long-term power purchase agreements for power that is generated from existing generation sources located outside of Minnesota, Minnkota's surplus power from the Milton R. Young 2 station has been devalued and member-owned entities like Basin and MRES can only enter into "long-term power purchase agreements" as defined by the statute with existing generations sources located in Minnesota. (Suppl. Tschepen Decl. ¶¶21-24)

The significance of this advantage to in-state facilities and the disparate burden imposed on out-of-state facilities cannot be overstated. As noted, unlike the statute's prohibitions on new large energy facilities which focus on coal-generation, the statute's prohibition on long-term power purchase agreements applies far more broadly to all generation sources that cause carbon dioxide emissions including natural gas, biomass, and diesel, as well as coal. Furthermore, transactions involving power-purchase agreements are far more prevalent than the development and construction of new large energy facilities.

C. Minn. Stat. §216H.03 Does Not Pass The *Pike* Balancing Test.

Defendants incorrectly assert that "a plaintiff seeking to invalidate a statute under *Pike* must make a *substantial showing*." (ECF 130 at 22)(citing *Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328, 337-38 (2008))(emphasis added). Neither *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), nor the case cited by Defendants for this proposition make any such statement.

Pike held that a state law that burdens interstate commerce *may* be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental...unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Thus, to even be eligible for consideration under the *Pike* test, a statute that affects interstate commerce must: (1) regulate evenhandedly (2) to effectuate a legitimate local public interest, and (3) have only incidental effects on interstate commerce. *Id.*

As demonstrated *supra*, the NGEA does not regulate evenhandedly. Further, as will be discussed *infra,* §216H.03 does not effectuate any legitimate local interest, and its effects on interstate commerce are anything but incidental. For these reasons, the statute is invalid.

1. Minn. Stat. §216H.03 Does Not Promote Any Interests Or Concerns That Are Truly "Local" To Minnesota That Justify The Burdens Imposed On Interstate Commerce.

Defendants have incorrectly asserted that Minn. Stat. §216H.03 "confers significant local benefits." (ECF 130 at 24) This argument is unsupported. Defendants have not identified any unique local interests that require Minnesota to interfere with interstate commerce.

First, the putative "local benefits" do not constitute truly "local benefits" in the context of the Dormant Commerce Clause. Second, other than the plentiful statutory exemptions which were at least intended to benefit in-state interests, there is no evidence that §216H.03 itself actually confers any benefits on Minnesota. Third, these "local benefits" could have been promoted through less restrictive means that are less burdensome on interstate commerce. Thus, even if §216H.03 did "not overtly discriminate against interstate commerce," the statute nonetheless violates the Commerce Clause because "the local interests that it serves do not justify the burden it imposes on interstate commerce." *R&M Oil & Supply, Inc. v. Saunders,* 307 F.3d 731, 735 (8th Cir. 2002)(quoting *U&I Sanitation v. City of Columbus,* 205 F.3d 1063, 1069 (8th Cir. 2000)).

Defendants assert that §216H.03 was enacted in anticipation of federal regulations regarding carbon dioxide emissions associated with the generation of electricity. (ECF 130 at 26-28) Such a justification is illusory, since presumably the "local interest" would not exist but for the possibility of federal regulation. Furthermore, the passage of a law in anticipation of a national regulation could not constitute a matter of unique local concern. On the contrary, the expectation that the federal government intends to regulate carbon dioxide emissions is an acknowledgement that this is an area that should be addressed through a national policy rather than state-by-state.

Defendants further assert that §216H.03 was enacted to promote clean energy that would foster public and environmental health interests. (ECF 130 at 29) Again, these general interests do not constitute unique local interests that would justify interference with interstate commerce. Defendants "Cf." citation to *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007), does not support this proposition. In *Massachusetts v. EPA*, the Court held that individual states have *standing* to petition and sue the EPA to take action as to possible regulation of carbon dioxide emissions because it is the EPA—not the individual states—that has the exclusive authority to decide whether to regulate carbon dioxide emissions. *Id.* at 521, 527.

Finally, even if these were legitimate local interests, the fact of the matter is that these interests "could be promoted as well with lesser impact on interstate activities." *R&M Oil & Supply*, 307 F.3d at 735 (quoting *Pike*, 397 U.S. at 142). For instance, rather than unilaterally foisting its policy beyond its own borders, the Minnesota Legislature could have instead regulated within its own borders and simultaneously pursued its goals through cooperative efforts with neighboring states by pursuing the goals established in the Midwest Greenhouse Gas Accord which Minnesota signed onto but never actually implemented (Suppl. Boyd Decl. Exs. W-X)

2. Minn. Stat. §216H.03's Burdens On Interstate Commerce Are Not Merely Incidental.

Defendants incorrectly argue that §216H.03 "imposes no cognizable burden on interstate commerce." (ECF 130 at 23) This assertion defies the plain language of the statute. The very purpose and goal of the statute is to require out-of-state businesses like Basin Electric, Minnkota, and MRES to change their resource planning to exclude generation sources that may be associated with carbon dioxide emissions.

Minn. Stat. §216H.03 must burden interstate commerce if it is going to achieve its purpose of forcing out-of-state entities like Basin, Minnkota, and MRES to either exclude coal-powered generation from the resource portfolios they acquire for the collective benefit of their interstate membership or, alternatively, for all of their members to bear the costs of complying with Minn. Stat. §216H.03's offset requirements. Likewise, Minn. Stat. §216H.03 must burden interstate commerce if it is going to achieve its goal of preventing the development of new large energy facilities that operate using lignite mined in North Dakota and that are operated in North Dakota, such as the ALE project and the South Heart project.

III. MINN. STAT. §216H.03 IS PREEMPTED BY THE FEDERAL POWER ACT.

Minn. Stat. §216H.03 is preempted by the Federal Power Act ("FPA") for the reasons set forth in Plaintiffs' Memorandum of Law In Support Of Summary Judgment. Simply stated, §216H.03 is preempted under both field preemption and conflict preemption because it impermissibly intrudes upon the federal government's exclusive regulation of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale. (*See* ECF 137 at 34-40) Under the FPA, the only area left for state regulation is "sale at local retail rates to ultimate consumers" and any other exceptions which Congress explicitly made subject to regulation by the states. *Fed. Power Comm'n v. S. Cal. Edison Co.,* 376 U.S. 205, 214-216 (1964). Yet §216H.03 goes far beyond regulating retail transactions by expressly prohibiting certain types of wholesale power transactions or, alternatively, imposing a tax upon those transactions in the form of "offsets."

Defendants contend "[t]he NGEA does not regulate in the same field as the FPA and accordingly is not preempted." (Doc. 130 at 31) However, it is impossible to reconcile Defendants' argument with the plain language of the NGEA, and the holdings of the Supreme Court interpreting the FPA. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988)("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates.") *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982)(FERC has "***exclusive authority*** to regulate the transmission and ***sale at wholesale of electric energy in interstate commerce, without regard to the source of production.***")(emphasis added); *S. Cal. Edison Co.*, 376 U.S. at 215-16 ("Congress meant to draw a bright line easily ascertained between state and federal jurisdiction…by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."). No cases cited by Defendants support the constitutionality of the NGEA in the face of this authority.

Instead, Defendants try to create a false presumption by arguing that "[b]ecause regulation of electric generation sources and utilities is a traditional state concern, there is a strong presumption against preemption." (ECF 130 at 31) However, the case cited by Defendants for this proposition—*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205 (1983)—neither creates such a presumption nor even recognizes its existence. Moreover, to the extent state regulation of electric generation sources is presumed to be valid, such presumption could only logically apply to generation sources located within the regulating state's borders. Ironically, in arguing that the NGEA is valid because states have the traditional right to regulate generation sources, Defendants are effectively arguing that Minnesota's authority supersedes that of North Dakota to regulate generation sources within North Dakota.

Defendants next characterize Plaintiffs' argument that the NGEA regulates transmission as "convoluted" because even though the Minnesota Legislature expressly defined "new large energy facilities" to include transmission lines, the statute as written would be absurd. Defendants claim that Plaintiffs' contention regarding the NGEA's regulation of transmission "relies *solely* on a cross-reference in the definition of 'new large energy facility' in Section 216H.03, subdivision 1, to the definition of 'large new energy facility' in Section 216B.2421, subdivision 2(1), which includes the phrase of transmission lines directly associated with the plant." (ECF 130 at 32-33)(emphasis original) However, Plaintiffs are not relying solely on the cross-reference. Indeed, §216H.03 plainly regulates transmission irrespective of this cross-reference.

Minn. Stat. §216H.03 specifically includes transmission line losses as part of its definition regarding "statewide power sector carbon dioxide emissions"—i.e., "the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota. ***Emissions of carbon dioxide associated with***

transmission and distribution line losses are included in this definition." Minn. Stat. §216H.03, subd. 2 (emphasis added). Additionally, Defendants admit that "[r]egulation of transmission involves the terms and conditions of transmitting electricity that has already been generated." By the express terms of the statute, this is exactly what the NGEA regulates when it prohibits "imports" unless a "project proponent" offsets the emissions associated with that "import." Thus, the statute facially regulates transmission by either barring "imports" or imposing terms and conditions upon those "imports" because that, by definition, regulates where and how the power can be transmitted.[9]

The Environmental Groups raise additional arguments against preemption that should also be rejected. First, they argue that the NGEA applies "only to power imported *and sold in Minnesota*" and "*that* condition—regardless of any indirect impacts on FERC's jurisdiction—is indisputably within the state's jurisdiction." (ECF 159 at 17 (emphasis original)) This is simply not true. Indeed, all power is eventually consumed in one state or another, but that does not give the state claiming to be the site of "consumption" the authority to regulate the transmission and wholesale transactions

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[9] Citing to FERC Order 888, Defendants argue that the NGEA is a "state resource planning statute" rather than a regulation on transmission. However, anything more than a superficial review of FERC Order 888 undermines Defendants' arguments. As FERC Order 888 states, "fundamental state regulatory authority" is generally limited to "generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories. ***We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies."*** 61 FR 21540, at 21542 (1996)(emphasis added). This quote makes two key points. First, state regulatory authority is generally limited to the items described above which occur within the states' borders. And second, even that authority may be limited in circumstances where exercise of state authority results in balkanization of interstate transmission or wholesale markets.

related to that power before it is distributed to the end consumer. Such a result would render the explicit exclusive jurisdiction of the Federal Government over such activities meaningless.

Relying on *Northwest Century Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 518 (1989), the Environmental Groups further argue that "a state law that impacts matters within FERC's control is not preempted so long as the State's purpose is to regulate subjects of state jurisdiction and the means chosen are at least plausibly related to matters of legitimate state concern." (ECF 159 at 17.) However, *Northwest*, a natural gas case, instead supports Plaintiffs. In *Northwest*, the Supreme Court held that the statute at issue was not preempted because it was a regulation on the production of natural gas within Kansas, and the Natural Gas Act expressly reserved for states the right to regulate "the production or gathering of natural gas." *Northwest*, 489 U.S. at 510, 518. Notably, the Court recognized that if the Kansas statute were being used as a means to regulate interstate pipeline "purchasing practices and pricing," it would have been preempted. *Id.* at 519.

Analogizing here, *Northwest* would only support the Environmental Group's argument if Plaintiffs were claiming that a Minnesota statute regulating a generation facility located in Minnesota were preempted. Instead, Plaintiffs are arguing that the statute impermissibly regulates purchasing practices and pricing for interstate power. Thus, *Northwest* supports Plaintiffs.[10]

[10] As previously argued, the NGEA effectively alters the "mix" of electricity generation available to satisfy the needs of an entire region. *Northwest* recognized that "[a]

Environmental Groups similarly overstate the support for their position supposedly found in FERC Order 888 and various cases addressing state implementation of PURPA standards for qualifying facilities or “QFs”. (ECF 159 at 17-18 (citing *In re S. Cal. Edison Co.,* 70 FERC 61215, 61676 (1995); *Cal. Pub. Utilities Comm’n,* 134 FERC 61044, 61160 (2010); *In re Midwest Power Systems, Inc.,* 78 FERC 61067, 61246 (1997)) When recognizing state authority in Order 888, FERC plainly limits its recognition to authority over retail matters or generation assets located within that state’s borders. *See supra* at 40 n.8. As to the PURPA cases, such cases are relatively meaningless for purposes of a pure FPA analysis because PURPA expressly reserves for the states certain regulatory authority over implementation of PURPA concerning QFs. *See* 16 U.S.C. §824a-3(f); *Power Res. Grp., Inc. v. Pub. Util. Comm’n of Tex.,* 422 F.3d 231, 236 (5th Cir. 2005)(“State regulatory authorities…are required to implement PURPA pursuant to the rules and regulations promulgated by FERC,” but “[a] state has broad authority to implement PURPA with respect to the approval of purchase contracts between utilities and QFs.”); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.,* 159 F.3d 129, 135 (3d Cir. 1998)(“Though PURPA does limit the authority of state agencies in some respects…PURPA still provides a substantial role to state agencies in regulating energy contracts between utilities and cogenerators”); *Indep. Energy*

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pipeline's purchase mix affects both its costs and the prices for which it sells its gas…and so comes within FERC's exclusive authority under the NGA ‘to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers.’” *Northwest,* 489 U.S. at 506-507 (quoting *Maryland v. Louisiana,* 451 U.S. 725, 748 (1981)).

Producers v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 856 (9th Cir.1994)("the state's authority to implement [16 U.S.C. §824a-3] is admittedly broad")).

Thus, PURPA expressly authorizes states to regulate certain wholesale transactions involving QFs. No such express authorization exists with respect to the FPA and wholesale transactions generally. And notably, Environmental Groups ignore an earlier ruling by FERC in the *California Public Utilities Commission* case, where FERC held that the California statute at issue ***would be*** preempted ***unless*** California could demonstrate the statute was a proper implementation of PURPA. *See* 132 FERC 61047, 61337-38 (2010). The NGEA cannot be justified by relying on PURPA cases.

IV. MINN. STAT. §216H.03 IS PREEMPTED BY THE CLEAN AIR ACT.

The NGEA is also preempted by the Clean Air Act for the reasons set forth in Plaintiffs' Memorandum in Support of Summary Judgment. (*See* ECF 137 at 40-46) The Supreme Court has held that carbon dioxide is a pollutant, and the Supreme Court has unqualifiedly declared that "Congress has delegated to the EPA the decision of whether and how to regulate carbon dioxide emissions from power plants." *Am. Elec. Power Co. v. Connecticut,* 131 S.Ct. 2527, 2531 (2011). The EPA is presently propagating rules specifically directed at carbon dioxide emissions from power plants. Against this backdrop and precedent, it is constitutionally forbidden for states to their own completely different mechanism for regulating carbon dioxide emissions.

Defendants argue that the NGEA does not regulate carbon dioxide emissions, but "[e]ven if the NGEA were deemed to regulate carbon dioxide emissions, the CAA does not preempt state laws regulating carbon dioxide emissions within the state." (ECF 130 at 35) First, it is simply wrong to say that the statute does not regulate carbon dioxide emissions. The stated purpose of the statute is to "reduce statewide greenhouse gas emissions across all sectors." Minn. Stat. §216H.02. To reduce "statewide power sector carbon dioxide emissions," the NGEA imposes restrictions on interstate transmission and wholesale sales of power. Minn. Stat. §216H.03, subd. 3. Second, Defendants' argument that the CAA does not "preempt state laws regulating carbon dioxide emissions within the state" simply misses the entire point of this lawsuit; that being that the NGEA is regulating carbon dioxide emissions ***outside*** the state. As the Court previously noted, "the NGEA does seek to regulate carbon emissions occurring outside of Minnesota." (ECF 32 at 30 n.10) This is plainly beyond the authority left to states under the CAA.

Undoubtedly, the states retain significant authority to regulate emissions within their own borders. Defendants have provided ample authority for this proposition.[11] (*See* ECF 130 at 37-40) Indeed, this argument and authority makeup the majority of Defendants' argument against preemption. However, it is entirely irrelevant to the issue before the Court: Whether efforts to control emissions occurring in other states through mechanisms other than the CAA are constitutionally permissible. They plainly are not.

As set forth in Plaintiffs' Memorandum In Support of Summary Judgment, courts have routinely and uniformly rejected efforts to control emissions occurring in other states through mechanism other than the Clean Air Act. (*See* ECF 137 at 41-46) On the

[11] States do retain authority over air pollution prevention and control. However, this authority must be exercised within the detailed framework provided by the CAA and the CAA only provides states with authority to regulate sources within their borders. *See* 42 U.S.C. §§7407(a), 7410(a)(1), (a)(2)(D)(i); 7420(a)(1)(B)(i).

other hand, Defendants have not presented or identified a single case where statutes similar to the NGEA have been upheld against a CAA preemption challenge. These cases simply do not exist, nor could they reasonably be expected to exist given the manner in which the CAA operates.

Similar to Defendants, Environmental Groups misconstrue the flexibility granted to states in regulating emissions occurring within their own borders as giving states carte blanche authority to regulate emissions occurring in neighboring states. (*See* ECF 159 at 20-21) Strangely, Environmental Groups acknowledge that the EPA has the authority to regulate carbon dioxide emissions from power plants and is currently proposing standards, but then argue Minnesota can effectively impose its own standards on emissions occurring in North Dakota and elsewhere. Such a result is simply inappropriate under the authority previously cited in Plaintiffs' Memorandum In Support of Their Motion for Summary Judgment.

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request the Court to deny Defendants' Motion for Summary Judgment in all respects.

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