IN THE UNITED STATES DISTRICT COURT
FOR THE 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 Cooperative, Inc.,

Plaintiffs,

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.

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

MEMORANDUM OF AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

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STATEMENT OF INTEREST

The American Public Power Association ("APPA") is the national service organization representing the interests of not-for-profit, publicly-owned electric utilities throughout the United States. More than 2,000 public power utilities, which do business in every state except Hawaii, provide over 15 percent of all kilowatt-hours of electricity sold to ultimate customers. Public power systems own about 10 percent of the nation's electric generating capacity, but purchase nearly 70 percent of the power they use to serve their customers. Of the 2,000-plus public power utilities in the United States, 129 are in Minnesota and 305 more are in the Upper Midwest.

APPA's members participate in wholesale power markets as buyers and sellers. Accordingly, APPA seeks to ensure that its utility members, which are all load-serving entities,[1] have every option available to them to achieve their primary goal—providing customers in the communities they serve with reliable electric power at the lowest reasonable cost, consistent with good environmental stewardship.

The National Rural Electric Cooperative Association ("NRECA") is the national service organization for more than 900 not-for-profit rural electric cooperatives and public power districts that provide electric service to approximately 42 million consumers in 47 states. Rural electric cooperatives serve 19 million businesses, homes, schools, farms, irrigation systems, and other establishments in 2,500 of the nation's 3,142 counties. Collectively, rural electric cooperatives own and maintain 2.5 million miles, or

[1] As other briefs have explained, load-serving entities ("LSEs") provide electric service to end-users and wholesale customers.

42%, of the nation's electric distribution lines, covering three quarters of the U.S. landmass and serving 13% of the nation's electric customers. In addition to providing electric services, rural electric cooperatives also provide critical jobs and tax revenue in rural areas, employing over 70,000 people and paying $1.4 billion in state and local taxes.

Rural electric service is provided through a network of 841 rural electric distribution cooperatives. Forty-three distribution cooperatives in Minnesota and 90 more in the Upper Midwest are members of NRECA.

ARGUMENT

The Commerce Clause of the United States Constitution grants Congress the authority to regulate interstate commerce. U.S. Const. art I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of that authority: Under the dormant Commerce Clause doctrine, states are prevented from enacting laws that discriminate against or unduly burden interstate commerce, or that seek to regulate commerce outside of the regulating state's borders. *R&M Oil & Supply, Inc. v. Saunders*, 307 F. 3d 731, 734 (8th Cir. 2002); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792 (8th Cir. 1995). Because Minnesota's Next Generation Energy Act ("NGEA"), Minn. Stat. § 216H.03, was enacted to regulate the behavior of actors outside of Minnesota's borders and unduly burdens interstate commerce, it is unconstitutional.

I. Defendants' new interpretation of § 216H.03 is not a saving construction.

Until submission of their briefs in this case, some, if not all, of Defendants asserted that out-of-state power generators were subject to the NGEA's import restrictions, Minn. Stat. § 216H.03, subd. 3(2) ("Clause 2"), by virtue of supplying power to the Midcontinent Independent System Operator, Inc. ("MISO") regional power market, which serves Minnesota along with 10 other states and a Canadian province.

Breaking with that previous position, Defendants now argue that the importation restriction in Clause 2 does *not* apply to power purchased by Minnesota utilities through the MISO market. (*See* Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 7.) Defendants' argument proceeds as follows: Since electricity on the MISO grid cannot be attributed to any particular power source, buyers on that market do "not know the physical source of electrons purchased." (*Id.*) Because purchasers do not "know" the source of the power, they cannot be said to "import or commit to import" that power. (*Id.* at 7–8.) Defendants continue to argue, however, that Clause 2's importation restriction *does* apply "to the agreement that the Minnesota entity makes outside of the MISO market regarding the relevant power." (*Id.* at 8.) In other words, Defendants continue to contend that entering into an agreement with a power supplier changes the character of a power purchase into "importation." Regarding the ban on long-term agreements, Minn. Stat. § 216H.03, subd. 3(3) ("Clause 3"), Defendants offer a different argument, claiming that "sales in the MISO energy market are for short-term energy," implying that short-term energy will never be the subject of what Clause 3 describes as "an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years." Defendants' new interpretations fail as saving constructions for several reasons.

First, a saving construction cannot be used where the statutory text in question is plain. Section 216H.03 plainly fails to include the limiting language that is essential to Defendants' new position. The Eighth Circuit has previously held that Minnesota may not offer a saving construction of a law alleged to violate the dormant Commerce Clause if the statutory language in question is plain and unambiguous. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792 (8th Cir. 1995).

In this case, whether or not buyers in the MISO market "*know* the physical source of the electrons purchased" is irrelevant. The plain and ordinary meaning of Clause 2 contains no "knowledge" (scienter) requirement. The statute simply states that "no person shall . . . import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions." Minn. Stat. § 216H.03, subd. 3(2). Nor can amici expect that a court or agency hearing a state enforcement action will read a scienter requirement into a business-regulation statute before that statute could serve as a basis for injunctive relief. *See, e.g.*, *Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 700 (1980) (refusing to read scienter requirements into certain federal securities statutes). Indeed, even in a criminal context, the Minnesota Supreme Court (whose decisions would presumably govern an enforcement action by Defendants under the NGEA) has held that the phrase "no person shall" in the state traffic code has "never been understood to require a showing of intent to provide a violation of the statute." *State v. Loge*, 608 N.W.2d 152, 157 (Minn. 2000); *see also In re Welfare of C.R.M.*, 611 N.W.2d 802, 806 (Minn. 2000) (observing that regulatory offenses are "not subject to a presumption requiring proof of mens rea to establish liability").

Similarly, Defendants' supposed saving interpretation of Clause 3 rests on an unsupported but dramatic leap in logic: that "short-term energy" will never be the subject of what the statute describes as "an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years." Here, as in *Cotto Waxo*, Defendants cannot avoid the required constitutional analysis by proffering a new interpretation when that interpretation conflicts with the plain meaning of the statute.

Second, when a saving construction is no more than a concession in a brief responding to a motion seeking invalidation, it does not solve the practical problems that § 216H.03 creates for APPA and NRECA members. Those members must make investment and pricing decisions that inevitably rest on premises about whether the import ban and long-term agreement ban mean what they say. A seemingly tactical concession in a brief is an insecure basis upon which to borrow millions for generation facilities, propose rates for customers, or commit to the kinds of contracts and commercial relationships to which § 216H.03 would seem to apply. Unless the saving language is *literally* added to § 216H.03 through a statutory amendment, the Court should adjudicate the constitutionality of the law's actual terms.

Third, Defendants' concession that buyers of power through MISO cannot know the source of the power they purchase renders senseless their assertion that MISO members' agreements to purchase power "outside of the MISO market" are subject to the § 216H.03. Due to the very nature of the MISO energy market, the generating capacity secured by MISO members in purchase agreements likely will not produce the specific electrons of energy that MISO members ultimately purchase and consume. (*See* Expert Report of Randall W. Porter, P.E., Boyd Decl. [Doc. No. 138-1], Ex. A ¶ 38.) A purchase agreement with an out-of-state energy producer does not change a Minnesota MISO member's lack of knowledge about the source of energy that it actually purchases and uses from the MISO market. A Minnesota MISO member that enters into a purchase agreement with an Iowa power plant fueled by landfill gas[2] is no more likely to *purchase* or *consume* the power actually generated by that plant than a Minnesota MISO member that has no contractual relationship with the plant. Both utilities are consuming energy from the very same pool of electrons. Nonetheless, Defendants now argue that the MISO member with the contract is knowingly "importing" energy from a particular source, while a member without the contract is not "importing" *the very same electrons*. No language in the statute can justify this construction. There is simply no basis on which Defendants can argue that one MISO member is "importing" power from a particular source, while the other is not. In short, the logic of Defendants' new interpretation of Clause 2 collapses upon itself.

Because Defendants' new interpretation of § 216H.03 does not moot or otherwise avoid the questions before the Court, it remains necessary to explain why Defendants' original formulation of § 216H.03 is unconstitutional.

[2] APPA and NRECA use this example intentionally. While much of the briefing in this case focuses on coal power plants, § 216H.03 reaches certain forms of biomass energy generation, including landfill gas power plants, which produce power by burning gases already produced by the nation's refuse. *See, infra,* Section III.A.1. The U.S. Environmental Protection Agency refers to this energy source as a "win/win opportunity," which decreases methane gas released into the environment and helps "offset the use of non-renewable resources such as coal, natural gas, and oil." EPA Landfill Methane Outreach Program, Basic Information, http://www.epa.gov/lmop/basic-info/index.html (last visited October 4, 2013).

II. Clause 2 is an unconstitutional exterritorial regulation.

The effect, if not the purpose, of Clause 2 is to change the way energy is generated, or at least to change the behavior of those who generate it, by forcing them to create offsets in specific response to the Minnesota statute. A qualified ban on the generation of energy from new facilities in Minnesota, and on the importation of energy from new facilities elsewhere, is the mechanism chosen by the state to accomplish this. Because much of the energy used in Minnesota is generated outside of Minnesota, the statute's primary impact falls on generators beyond Minnesota's borders. (*See* Expert Report of Randall W. Porter, P.E., Boyd Decl. [Doc. No. 138-1], Ex. A ¶ 41.)

At the outset, APPA and NRECA emphasize that their objection to the Minnesota law does not turn on whether regulated power plants outside of Minnesota's borders are powered by coal versus other sources of power. While much of the briefing in this case has focused on coal power and the coal industry, the statute itself makes no reference to coal. Indeed, the statute touches renewable energy sources outside of Minnesota, including plants powered by landfill gas, sewage, mixed municipal waste, and fuels derived from such waste. Minn. Stat. § 216H.03, subd. 2 (excepting certain types of biomass—but not all—from the energy sources considered to contribute to statewide carbon dioxide emissions).

A. A state may not dictate how electricity is generated in other states.

Section 216H.03's constitutional flaws are fundamental. Electric power has long been considered an article of interstate commerce. *See, e.g.*, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339, (1982) (overturning a law restricting exports of hydropower, after noting that "the Commission's 'exportation ban' places direct and substantial burdens on transactions in interstate commerce"). In accordance with established Supreme Court precedent, the Eighth Circuit has explained 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." *Cotto Waxo*, 46 F.3d at 793 (citing *Healy v. Beer Institute,* 491 U.S. 324, 336 (1989)). "Extraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way." *Cotto Waxo*, 46 F.3d at 793. Put another way, the Eighth Circuit has held that "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to in-state terms." *Id.* at 794.

The principle preventing extraterritorial state regulation of energy generation is vital to the increasingly interconnected energy markets in which APPA and NRECA members buy and sell power. If states are allowed to dictate how power is generated outside of their borders, multiple states are likely to enact different and conflicting regulations potentially affecting the same generation facilities, striking different balances between various objectives. States seeking more affordable and reliable electricity would adopt laws to make it more attractive to build generation facilities around the region and nation using the lowest cost and most widely available fuel. Other states could choose to elevate different policy priorities. Inconsistent and conflicting regulations from state to state could render regional power markets ever more impractical to administer, increasing the costs faced by APPA and NRECA members (and thus by their customers). APPA and

NRECA are concerned, for example, that affirming the legality of Minnesota's law could pave the way for coal-producing states—which have obvious interests in promoting the use of that power source—to limit and obstruct the development of renewable power sources in neighboring states.

The laws of other states that would conflict with § 216H.03 could also reflect states striking different balances *between* competing environmental objectives. For example, the solid waste management laws and policies of many states favor recovering energy from waste and reducing dependence on land disposal of waste.[3] If Chicago built a new garbage incinerator to reduce its citizens' dependence on the environmentally-inferior option of landfills, Minnesota's market of energy distributors and users would effectively be closed to energy generated by Chicago's plant unless the project proponent satisfied Minnesota's highly-restrictive offset requirements. A state prioritizing the goal of slowing consumption of land for waste disposal over the goal of reducing greenhouse gases ("GHGs") would regulate this technology in a way contrary to § 216H.03.

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[3] Indeed, the statutory goals of Minnesota's own solid waste management policy include recovering energy from waste and reducing indiscriminate dependence on land disposal of waste, Minn. Stat. § 115A.02, subd. (a). Resource recovery through incineration ranks higher on Minnesota's waste management hierarchy than land disposal. *Id.,* subd. (b). Land disposal is particularly discouraged if it does *not* involve the retrieval of landfill gas "as fuel for the production of energy to be used on site or for sale." *Id.* Although Minnesota's environmental objectives relating to recovering energy from waste may have become contradictory upon the NGEA's adoption in 2007, that is not true elsewhere. *See, e.g.*, Fla. Stat. § 403.702(2)(i) (declaring Florida's purpose to utilize all means reasonably available to promote the economical recovery of energy resources from solid waste).

B. Defendants' narrow interpretation of the extraterritorial doctrine is unfounded.

Defendants mistakenly assert that "[t]he Supreme Court has not extended the [extraterritorial] doctrine beyond price control laws." (*See* Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 25 (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003).) As the Supreme Court explained the extraterritorial doctrine in *Healy*, a case cited with approval in *Walsh*, "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state *regulatory regime* into the jurisdiction of another State." 491 U.S. at 336–37 (emphasis added). The Court further explained that the extraterritorial doctrine "dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 337 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986)). Explaining the standard for evaluating state regulations under the extraterritorial doctrine, the Court said, "[t]he critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336 (emphasis added).

Walsh did not overrule these principles or state that the only "regulations" subject to the extraterritorial doctrine are price control measures. In *Walsh*, the plaintiffs alleged that a Maine statute was akin to the price control statute addressed in *Healy*. *See Walsh*, 538 U.S. at 669. In several sentences, the Court explained that it was not persuaded that the Maine statute acted extraterritorially and that the rule from *Healy* was not applicable. *Id.* But the Court announced no new rule. *See id.*; *see also Grand River Enters. Six*

Nations, Ltd. v. Beebe, 574 F.3d 929, 942 (8th Cir. 2009) (reciting *Healy's* "practical effect" test six years after *Walsh*). As Plaintiffs here have noted, many courts have applied *Healy*'s formulation of the extraterritorial doctrine in a myriad of cases *not* involving price control laws, both before and after *Walsh*. (*See* Pls.' Opp. to Defs.' Mot. for Summ. J. [Doc. No. 171] at 25–26, and cases cited.) It is beyond question that the Supreme Court did not so severely narrow the standard clearly set forth in *Healy* or eliminate an established doctrinal standard while, in the same breath, citing *Healy* itself.

C. Clause 2 "projects" Minnesota's regulations into other states, clearly violating the extraterritorial doctrine.

Clause 2 is a rare instance of one state impermissibly attempting to regulate outside its borders. By effectively requiring compliance by any power generator interconnected with the MISO network, Clause 2 is an impermissible "projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336–37.

1. Clause 2 impermissibly regulates out-of-state participants in an interstate electrical network.

The problem presented in *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), a case decided after *Walsh*, has strong parallels with this case. There, the Court examined a Vermont law which prohibited transfer of sexually explicit material deemed "harmful to minors" via the internet. While the Vermont law did "not discriminate against interstate commerce on its face," the Court concluded that the law "present[ed] a *per se* violation of the dormant Commerce Clause" because Vermont had "'projected its legislation' into other States, and *directly regulated* commerce therein." *Id.* at 104 (quoting *Brown-Forman*, 476 U.S. at 584). In reaching this conclusion, the Court noted that "[b]ecause the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'project[ing] its legislation into other States.'" *Id.* at 103 (quoting *Healy*, 491 U.S. at 334). The Court rejected Vermont's arguments that its law could be limited only to transmissions to Vermonters, concluding that—due to the inherently cross-border nature of the internet—"the rest of the nation [would be] forced to comply with [Vermont's] regulation." *Id.* For these reasons, the Court concluded that state-by-state regulation of an interstate network would be simply "impracticable." *Id.*

Modern regional electrical power grids and markets (such as MISO) share striking similarities to the internet. Users in states geographically far from Minnesota are "connected" to Minnesota in much the same way that internet users in far-flung states and countries are connected to Vermont. Power generated in one state may be consumed by users in another state. The nature of the network is such that power producers do not know and cannot control who consumes the energy that they generate, and consumers are likewise unable to know the source of the power that they consume. As Defendants themselves note, such knowledge would be "impossible" to prove because "[i]n the MISO energy markets, a buyer is simply purchasing electricity from a pool of electrons in the transmission system" and, as a result, "does not know the source of electrons purchased." (Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 7–8.)

Given the physics of the grid, a Minnesota MISO member could consume an electron generated by a power plant as far afield as Wyoming or Missouri and thereby "import" such energy into Minnesota pursuant to Clause 2. Indeed Minnesota has already asserted that the mere possibility that electricity from a Wausau, Wisconsin power plant could be transmitted to Minnesota is sufficient to warrant § 216H.03's application to that plant. (*See* MNPUC Public Comments, Docket No. ET3/RP-11-918, Boyd Decl. [Doc. No. 138-1], Ex. O at 27.) The Minnesota Public Utilities Commission ("MNPUC") has taken the position that "all members" of a MISO member power cooperative, including those located outside of Minnesota, must "bear responsibility" for "any MISO purchases" and, therefore, ensure that such purchases comply with § 216H.03. (*Id.* at 28 (concluding that Dairyland, as a MISO member with power generation facilities in Wisconsin, "clearly *imports* power" into Minnesota) (emphasis added).)

2. The risk of inconsistent and conflicting regulations is real.

By attempting to regulate the sources of electrons that make their way across the interconnected electrical grid from remote states, Minnesota is "project[ing] its legislation" into those other states. *Healy*, 491 U.S. at 334. As state regulations proliferate, the resulting patchwork of conflicting rules will become "impracticable." *Am. Booksellers Found.*, 342 F.3d at 104. The threat of increasingly impracticable regulations is not merely theoretical. In 2008, Michigan—another state connected to the MISO regional market—enacted a statute requiring utilities in that state to "obtain at least 10 percent of their electrical power needs from renewable sources by 2015" while also "forbid[ing] Michigan utilities [from] count[ing] renewable energy generated outside the state toward satisfying the requirement." *See Ill. Commerce Comm'n v. Fed. Energy Regulatory Comm'n*, 721 F.3d 764, 776 (7th Cir. 2013) (noting in dicta that Michigan's statute itself likely violates the dormant Commerce Clause).

While the use of electricity in Minnesota may be the *context* for the state's regulation in this area, the Minnesota legislature is not attempting to modify energy-*user* behavior through § 216H.03. There is nothing in § 216H.03 that suggests it was intended to reduce the overall consumption of electricity in Minnesota, for example. Rather, the statute works by requiring "people or businesses to conduct their out-of-state commerce in a certain way, outside of Minnesota." *Cotto Waxo,* 46 F.3d at 793. Unlike the types of regulations that survive extraterritoriality review, changing commercial behavior occurring outside of the state's boundaries is not an incidental effect of the statute. Rather, controlling behavior of actors outside of Minnesota is one of § 216H.03's principal objectives.

III. Section 216H.03 is unconstitutional under the dormant Commerce Clause because it fails the *Pike* balancing test.

To assess whether a state law unduly burdens interstate commerce, courts weigh the burden the law imposes on interstate commerce against the putative local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *R&M Oil & Supply, Inc*, 307 F. 3d at 734. When the burden on interstate commerce is "clearly excessive in relation to the putative local benefits," the law violates the dormant Commerce Clause. *Pike*, 397 U.S. at 142. The significant burden § 216H.03 imposes upon interstate commerce outweighs any putative local benefit and is therefore unconstitutional.

As the Eighth Circuit has recognized, "the dormant Commerce Clause carries out 'the Framers' purpose to 'preven[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole[.]'" *S.D. Farm Bureau Inc. v.*

Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (quoting in turn *Okla. Tax. Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995))). While § 216H.03's *goal* may be laudable, its *means* will force Minnesota utilities to retreat into economic isolation. Specifically, the predominant regional marketplace for day-to-day energy needs does not afford Minnesota utilities a meaningful opportunity to limit their purchases to energy that is the product of generation facilities that meet any particular state's test for appropriateness.

Applying the three-pronged *Pike* analysis to § 216H.03 makes plain that the statute runs afoul of the dormant Commerce Clause.

A. Section 216H.03 imposes significant, excessive burdens on interstate commerce.

The prohibitions in Subdivision 3 of Minn. Stat. § 216H.03 impose significant burdens on interstate commerce. Defendants concede that "the buyer [of electricity in the MISO energy markets] is simply purchasing electricity from a pool of electrons in the transmission system," and "does not know the physical source of electrons purchased." (Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 7.) As described above, the route by which electricity generated at a power plant reaches Minnesota consumers of electricity is not direct or easily discernible when purchased through MISO. MISO is the dominant marketplace for electrical power in the Upper Midwest, and a number of other regions rely on similar markets. It is a marketplace that does not—and cannot—track the origin of each electron, because of how MISO manages the supply of energy to match demand. (*See, e.g.*, Wahle Decl. [Doc. No. 143] ¶¶ 9-17.) Even when purchasers enter into long-term power purchase agreements ("PPAs") with suppliers or generation unit ownership arrangements that conform to § 216H.03's requirements, the actual electrons that the purchasers obtain will be commingled with electrons from many other sources, including sources that might not comply with the Minnesota statute, regardless of "Minnesota's authority to regulate the resources on which Minnesota utilities rely," (Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 27.)

Against this background, § 216H.03 substantially constrains APPA and NRECA members and burdens interstate activities. APPA and NRECA members must limit their energy purchases and contracts under the statute based on whether the energy is produced at acceptable out-of-state facilities. To meet the stringent statutory requirements, APPA and NRECA members may have to accept higher prices or more limited supply options. Out-of-state suppliers that cannot meet the requirements the Minnesota legislature set forth in § 216H.03 will see their markets shrink. Such constriction has a direct negative impact on interstate commerce.

1. The prohibitions in Clause 3 on certain long-term PPAs adversely impact regional markets.

The impermissible burdens imposed on interstate commerce derive in part from the burdens of prohibiting certain contracts. Clause 3 dictates that "no person shall . . . enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions." Minn. Stat. § 216H.03, subd. 3(3). A "long-term power purchase agreement" is further defined as "an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years." *Id.* The limitations in

Clause 3 makes it more difficult for load-serving entities to manage risks, either through ownership of, or through contractual rights to a wide portfolio of power supply resources. These are the type of "ripple effects" that make a burden excessive. *Metro Produce Distrib., Inc. v. City of Minneapolis*, 473 F. Supp. 2d 955, 963–64 (D. Minn. 2007) (ordinance that prohibited refrigeration trucks from running during certain times necessarily altered schedules of other deliveries in other locations). The limitation on long-term PPAs creates impermissible burdens on interstate commerce in several ways: (1) new plants that generate energy are less likely to be built; (2) load-serving entities, like APPA's and NRECA's members, are less able to hedge against risk and manage price, having fewer long-term purchase options to depend upon; and (3) compounding problems (1) and (2) leads to instability in the whole market.

First, limitations on who may contract long-term for the output of a plant producing a certain type of energy product makes it less likely such plants will be built at all. Investors generally require assurances of cost recovery before providing capital. Long-term PPAs provide such assurances. And the burden the limitation in Clause 3 creates is far-reaching; it impacts a variety of different types of plants, including plants that might be built to process landfill gas or mixed municipal solid waste. *See* Minn. Stat. § 216H.03, subd. 2 (defining "statewide power sector carbon dioxide emissions" to include emissions resulting from combustion of landfill gas, sludge from sewage treatment plants, or mixed municipal solid waste, per Minn. Stat. § 216B.2411, subd. 2(c)(5)–(7)).

Further, the limitations on the ability to contract long-term for the output of a plant make it difficult for load-serving entities like co-ops and municipalities to hedge their risks in short-term markets, such as the one MISO operates. LSEs both within and outside of regional transmission organizations build plants or enter into long-term PPAs to fix the costs of a portion of their power supplies over longer time periods, minimizing their exposure to significant volatility in spot markets. The restriction on long-term PPAs also causes LSEs difficulty in managing price risk. If LSEs can buy only generation produced from certain fuel sources, then they are significantly exposed to price volatility and availability issues associated with those fuels.

Finally, § 216H.03 imposes a significant burden by creating a barrier to certain resources, which in turn undermines the whole market. Once a plant is constructed based on long-term arrangements, the available power from that plant is available in the MISO market to anyone if the plant clears the relevant auction. That provides the whole market some price stability because of the fuel diversity benefit. It also provides reliability benefits and keeps prices more competitive. Defendants argue that the impact of § 216H.03 is only that "in-state consumers will simply replace [a particular product] with another article of interstate commerce." (Defs.' Mem. of L. in Supp. of Mot. for Summ. J. [Doc. No. 130] at 23.) This argument is a gross oversimplification of how the MISO market works. The statute does not merely cause an end consumer to purchase Brand X commodity instead of Brand Y. As Defendants now concede in their Memorandum in Opposition, a buyer "does not know the physical source of electrons purchased." (Defs.' Opp. to Pls.' Mot. for Summ. J. [Doc. No. 166] at 7.) Because Clause 3 necessarily limits the generation capacity some MISO members can bid into the market, Clause 3 impacts the entire MISO market. This is an additional burden on interstate commerce.

2. If several jurisdictions imposed similar statutes, the burden would be unmanageable.

When examining the cumulative effects of state laws challenged under the dormant Commerce Clause, courts also consider the interstate effect on the market if several jurisdictions were to adopt similar statutes. *Healy*, 491 U.S. at 336; *R&M Oil & Supply, Inc*, 307 F.3d at 735 (in assessing the interstate effect if several jurisdictions adopted similar laws, "we would be turning a blind eye to reality if we did not acknowledge that such a situation could create a substantial burden on interstate commerce along the border of the states throughout the country"). If multiple states devised their own regulatory schemes, predictably with variations among them that strike different balances between the values of environmental protection, reliability and low rates, the burden on utilities to purchase energy from certain types of plants for use in certain states could easily become impossible, particularly in the MISO marketplace. Such variety between regulatory schemes could easily lead to a re-balkanization of the energy grid.

B. Any local benefits resulting from the restrictions of § 216H.03 are de minimis compared with the significant, excessive burdens imposed on interstate commerce.

As *Pike* makes clear, to pass the balancing test the burdens on interstate commerce must be counterbalanced by putative local benefits. The purported benefit of § 216H.03 is the reduction of greenhouse gases into the atmosphere. But that benefit is unclear, given that MISO directs the dispatch of the generation units in the region. (*See* Expert Report of Randall W. Porter, P.E., Boyd Decl. [Doc. No. 138-1], Ex. A ¶¶ 31, 34–39) (explaining MISO directs which generation facilities to run and that "electricity is taken out of the market without regard to generation source").)

When the benefit to be derived from a state statute is minimal compared with the excessive burdens it imposes on interstate commerce, the statute is unconstitutional. For example, in *R&M Oil & Supply, Inc.*, 307 F.3d at 735, the Eighth Circuit agreed that a Missouri state law regulating the storage of propane was unconstitutional under the dormant Commerce Clause. The state law required persons engaged in the bulk sale of propane at retail to maintain and operate a minimum storage capacity of 18,000 gallons in the state. Compliance with the statute came at a $25,000 price tag for retailers, for the purchase and installation of the storage tank, in addition to the market price for land upon which to store the tank and annual maintenance fees. *Id.* at 733–34. The state contended that the statute constituted a health and safety regulation to protect those who rely on propane to heat their homes in the wintertime from shortages. But where the law did not actually require distributors to keep propane in the storage tanks, the Eighth Circuit determined that the local benefit derived from the statute was minimal to nonexistent, since it did not appear that the statute would actually protect local citizens from propane shortages. *Id.* at 736.

Despite its policy objectives, Minnesota's statute is particularly unlikely to achieve intended benefits because of the difficulty that an energy using state will have in changing the behavior of nonresident electric generators operating in regional markets.

The possibility of other states enacting similar (or retaliatory) statutes, further burdening interstate commerce in electricity, is clearly present. The problem is compounded by the fact that Minnesota's offset-driven policy has become law in advance of the creation of any meaningful system for buying and trading offsets in the region.

C. The putative local interests are addressed already by laws with lesser impact on interstate activities.

The final factor in the *Pike* test is whether the state's interests could be promoted as well with a lesser burden on interstate commerce. The Minnesota Legislature has already instituted several measures intended to cut GHG emissions associated with electricity generation. Minnesota has passed one of the strongest renewable energy standards in the nation, requiring at least 25% of Minnesota utilities' retail sales to electric customers to be generated from renewable sources by 2025. Minn. Stat. § 216B.1691, subd. 2(a). The Legislature has also created programs to boost energy savings goals, develop local renewable projects, and cut GHGs by other methods. *See, e.g.*, Minn. Stat. §§ 216B.1694 (innovative energy project); 216B.2423 (wind power); 216B.2424 (biomass power). These laws address the same objective without the same impermissible impacts on interstate commerce imposed by § 216H.03. Because Minnesota has laws less burdensome on interstate commerce to promote the interests that may stem from § 216H.03, the statute fails the final element of the *Pike* test.

CONCLUSION

For the foregoing reasons and those identified in Plaintiffs' briefs, amici APPA and NRECA respectfully submit that § 216H.03 must be held unconstitutional.

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