





1 216H.03. The purpose of this statute is to limit emissions  
2 of carbon dioxide resulting from Minnesotan's use of  
3 electric power in this state. The statute accomplishes its  
4 purpose by regulating the type of new electric generation  
5 resources used in this state. Section 216H.03 is a lawful  
6 exercise of the state's traditional authority to determine  
7 the type of electric generation resources used in the state.

8 THE COURT: Counsel, I'm going to ask you to move  
9 slightly forward and speak a little bit more into the mike.  
10 Sorry. Appreciate it.

11 MS. COCHRAN: Certainly.

12 THE COURT: Better.

13 MS. COCHRAN: Plaintiffs' assertion that Section  
14 216H.03 instead regulates transmission, wholesale sales and  
15 interstate air emissions is not supported by a proper  
16 reading of the statute. As a result, Plaintiffs' Federal  
17 Power Act and Clean Air Act preemption claims fail.

18 In considering these preemption claims in more  
19 detail, it's critical to keep in mind several important  
20 principles. First, preemption is found only where it's  
21 Congress's clear and manifest intent.

22 Second, the presumption against preemption applies  
23 in this case.

24 Third, the Minnesota Statutes are to be  
25 interpreted in a manner that effectuates the legislature's

1 purpose.

2 And fourth, Minnesota Statutes are to be  
3 interpreted in a manner that avoids preemption.

4 As I will discuss, applying these principles to  
5 this case requires a dismissal of Plaintiffs' preemption  
6 claims. With regard to the Federal Power Act, Plaintiffs  
7 bring two claims. Plaintiffs assert that Section 216H is  
8 preempted because it regulates transmission and they also  
9 assert it's preempted because it regulates wholesale sales.  
10 Section 216H.03 does no such thing. Plaintiffs' arguments  
11 to the contrary stem from Plaintiffs' mischaracterization of  
12 the statute and failure to recognize the legislature's  
13 purpose.

14 First, Section 216H.03 does not regulate  
15 transmission. When read as a whole, it's clear that section  
16 216H.03 is concerned with the type of power used in  
17 Minnesota, not the transmission or delivery of the power  
18 itself.

19 Section 216H.03 limits the use of new power that  
20 would contribute to statewide power sector carbon dioxide  
21 emissions. The word "import" which Plaintiffs focus on only  
22 indicates that power imported into Minnesota and consumed in  
23 Minnesota is covered by this statute and cannot be used in  
24 Minnesota unless the emissions are offset. It does not  
25 regulate the transmission of the power itself.

1           Why? Because it does not regulate the terms or  
2 conditions of the actual transmission of the power; the  
3 process of moving electricity. It regulates whether the  
4 power is used in the state.

5           Likewise, Plaintiffs' selective reliance on the  
6 reference to transmission lines in a different statute,  
7 Minnesota Statute 216B.2421, Subdivision 2(1) to argue that  
8 Section 216H.03 somehow regulates transmission or  
9 transmission facilities fails. The transmission line  
10 language in that other statute is not relevant for purposes  
11 of Section 216H.03. The only part of that other statute  
12 that's relevant or the clause of that other statute that's  
13 relevant is the reference to electric power generating  
14 plants which Plaintiffs ignore. It's that language that has  
15 relevance here.

16           And this -- if the legislature actually had been  
17 intending to regulate transmission lines, it would have  
18 included the other clauses in 216B.2421 that specifically  
19 deal with transmission but it did not. And this is  
20 confirmed by the legislative history, the acts summary from  
21 House research specifies that the words "a new large energy  
22 facility" only means an electric generating plant.

23           So the plain language in 216H.03 in no way  
24 regulates transmission or transmission facilities. And  
25 interpreting the statute in this matter is the only

1 interpretation that furthers the legislature's purpose. The  
2 legislature wasn't concerned with the transmission of the  
3 power or the transmission facility, but rather the use of  
4 the power in the state because it could contribute to  
5 statewide carbon -- power sector carbon dioxide emissions.

6 Likewise, there's no basis for Plaintiffs' claim  
7 that Section 216H.03 somehow regulates wholesale sales.  
8 First of all, this issue is not properly before the Court.  
9 It was not pled in Plaintiffs' amended complaint. But in  
10 any event, this argument fails for many of the same reasons  
11 that Plaintiffs' transmission argument fails. Section  
12 216H.03 does not regulate wholesale sales. As I explained  
13 before, the statute limits the use of new power in Minnesota  
14 at -- excuse me -- that would increase statewide power  
15 sector carbon dioxide emissions unless the emissions are  
16 offset. The statute focuses on the construction of new  
17 facilities, the imports of power into Minnesota, and power  
18 purchase agreements because these are the means by which  
19 utilities provide power for use by retail customers in the  
20 state.

21 So Section 216H.03 limits the use of power from  
22 all three of these means. The power purchase agreement  
23 language is included solely for this purpose, not to  
24 regulate wholesale sales. It does not set the terms or  
25 conditions of any wholesale sales. The statute only limits

1 whether that power is used in Minnesota.

2 Plaintiffs' interpretation to the contrary is --  
3 would thwart both the purposes of the statute and the  
4 Federal Power Act. Utilities commonly acquire power by  
5 power purchase agreements for use by retail customers in  
6 this state. If one were to adopt Plaintiffs' erroneous  
7 position that states can't regulate the type of power used  
8 in the state simply because the power could be acquired by a  
9 power purchase agreement, the state's authority to do  
10 resource planning, which is clearly within its authority and  
11 the state's authority over retail sales, would be rendered  
12 meaningless. States would be denied this authority because  
13 resource generation decisions and retail rate decisions  
14 necessarily involve power, purchase through power purchase  
15 agreements, because that's one of the means that utilities  
16 obtain the power that they need to serve their customers.

17 In sum, there's no basis for Plaintiffs' Federal  
18 Power Act preemption claims because Section 216H regulates  
19 the type of power used in the state, not wholesale sales or  
20 transmission.

21 THE COURT: Do we have some authority in other  
22 jurisdictions or analogous authority that's helpful in  
23 trying to envision this distinction you're drawing in?

24 MS. COCHRAN: Well, your Honor, FERC has  
25 recognized that states have authority over resource

1 planning. And resource planning, as you can see from  
2 looking at the Minnesota Resource Planning Statute, involves  
3 consideration of how the utility will obtain the resources  
4 it needs to serve its customers by considering whether to  
5 build new facilities, to acquire power from others, and  
6 to -- or to do conservation or some combination of those  
7 things.

8 So the Resource Planning Statutes that states use  
9 involve these exact same types of decisions. And the  
10 legislature is simply making a decision that -- a decision  
11 about what type of resources that the state will use.  
12 That's within the state's historic resource planning  
13 authority.

14 THE COURT: Is there any other case precedent  
15 around the country in which there's been a similar  
16 challenge?

17 MS. COCHRAN: Your Honor, no, there's no direct  
18 authority on point. There is a similar California law but  
19 that law has not been challenged in court. There are a  
20 number of states that have renewable portfolio standard  
21 requirements, the vast majority of the states. Those also  
22 are determinations by the states as to what type of power  
23 should be used in the state. And I'm not aware of any  
24 challenges to any of those states' statutes regarding  
25 renewable portfolio requirements.

1           This is an area that's within the state's historic  
2 authority and that's likely why there haven't been any  
3 challenges because to insure that utilities have the  
4 resources that they need to serve the customers, states need  
5 to make decisions to insure that utilities have available  
6 resources that are reliable, cost-effective and  
7 environmentally responsible. And this is a legislative  
8 decision in that regard.

9           I'd like to turn now to the -- just one final  
10 point. The cases that Plaintiffs cite to try and argue that  
11 this somehow is preempted are not on point at all. They  
12 involve situations where FERC had made a decision about what  
13 power from a particular type of resource should be allocated  
14 to a particular utility for cost purposes. This statute in  
15 no way implicates any of those type of decisions that FERC  
16 has made in the past. This is clearly within the state's  
17 traditional resource planning authority.

18           I'd like to turn now to the Clean Air Act claim  
19 unless the Court has further questions.

20           THE COURT: You may proceed.

21           MS. COCHRAN: Thank you. Plaintiffs' Clean Air  
22 Act claim also fails as a matter of law. In considering  
23 this claim, here again it's important to keep in mind that  
24 preemption is not to be lightly presumed. Congress's intent  
25 to preempt must be clear and manifest. Here Plaintiffs'

1       preemption claims fail because there's no basis for findings  
2       in Section 216H.03 that it's preempted by the Clean Air Act.

3               First, the Clean Air Act has reserved significant  
4       state authority over air emissions and state authority to  
5       regulate air emissions. Faced with this argument,  
6       Plaintiffs have reframed their argument and now are  
7       attempting to claim that Section 216H.03 is preempted based  
8       on their erroneous assertion that Section 216H.03 regulates  
9       air emissions in other states.

10              This claim is not properly before the Court as  
11       we've -- for the reasons stated in our memoranda. But in  
12       any event, this claim also fails. Section 216H.03 does not  
13       regulate interstate air emissions. The only air emissions  
14       it regulates are for facilities to be built in Minnesota.  
15       Companies in other states can build as many new power plants  
16       as they like, generate as much new power as they like, and  
17       emit as much CO2 as they like consistent with Section  
18       216H.03. Nothing in the statute limits activities or  
19       emissions in other states.

20              The salient provisions relied on by Plaintiffs to  
21       argue that the statute somehow is regulating emissions in  
22       North Dakota simply do not do that. What they regulate is  
23       whether the power will be used in Minnesota and that -- and  
24       there's no clear and manifest intent in the Clean Air Act to  
25       preempt the state's traditional authority over resource

1 generation decisions. The Clean Air Act doesn't even  
2 address those matters.

3 So Plaintiffs' Clean Air Act -- there's really no  
4 basis for Plaintiffs' Clean Air Act because the provisions  
5 that Plaintiffs are concerned about are really outside of  
6 the scope of the Clean Air Act.

7 The *American Electric Power* case and North  
8 Carolina cases relied on by Plaintiffs to try and argue that  
9 Section 216H.03 is not preempted -- or is preempted are not  
10 on point. And before I explain that point in detail, I'd  
11 like to correct a mistake that I made in our reply  
12 memorandum which I discovered when I was re-reading the  
13 brief in preparation for oral argument.

14 On page 12 of our reply memorandum it states that  
15 both of these cases address whether a state can bring a  
16 nuisance claim to address carbon dioxide emissions from  
17 specific power plants. And while both these cases do  
18 address nuisance lawsuits to limit emissions from specific  
19 power plants, only the *American Electric Power* case involved  
20 carbon dioxide emissions. The North Carolina case actually  
21 involved emissions of sulphur dioxide, nitrogen oxide  
22 particulates in an ozone from 11 coal-fired power plants.  
23 So I just wanted to clarify that.

24 But in any event, what that really means is the  
25 *American Electric Power* case -- well, neither case has

1 really any relevance. The *American Electric Power* case has  
2 even less relevance because it involves different  
3 pollutants. And those pollutants, SO<sub>2</sub> particulates in an  
4 ozone, are what are known as criteria pollutants and are  
5 subject to a detailed regulatory scheme under the Clean Air  
6 Act.

7 THE COURT: Now you confused me a little bit.

8 MS. COCHRAN: I'm sorry.

9 THE COURT: Now is it the North Carolina case that  
10 involves the other pollutants?

11 MS. COCHRAN: Yes, your Honor. And I apologize  
12 for that mistake.

13 THE COURT: Okay.

14 MS. COCHRAN: And those other pollutants are what  
15 are known as criteria pollutants under the Clean Air Act and  
16 there is a detailed regulatory scheme dealing with those  
17 criteria pollutants. CO<sub>2</sub>, on the other hand, is not a  
18 criteria pollutant. So the language that the Plaintiffs  
19 cite from the North Carolina case about the detailed  
20 regulatory scheme in the Clean Air Act really has no  
21 relevance to carbon dioxide emissions.

22 But in any event, neither case really has any  
23 relevance because in those cases both cases involve nuisance  
24 lawsuits asking the Court to set specific emission limits.  
25 So that's not what Section 216H.03 does. It in no way

1 implicates specific limits for particular power plants.  
2 What it does is limit the type of new power that's used in  
3 Minnesota because of the legislature's concern about our use  
4 of power and its environmental impacts.

5 And for these reasons, and those -- there's no  
6 clear and manifest intent of Congress to preempt a law like  
7 Section 216H.03. So for these reasons and those set forth  
8 in our memoranda, the Court should dismiss the Plaintiffs'  
9 Federal Power Act and Clean Air Act preemption claims.

10 Defendants' motion also address the Plaintiffs'  
11 privileges and immunities claim and Plaintiffs' due process  
12 claim, as well as the erroneous naming of the Attorney  
13 General as a Defendant to this lawsuit. With regard to  
14 those matters, I would refer the Court to our memoranda  
15 unless the Court has any specific questions.

16 THE COURT: No. Very good.

17 MS. COCHRAN: Thank you.

18 THE COURT: Thank you.

19 Mr. Boyd.

20 MR. BOYD: Good morning, your Honor.

21 THE COURT: Good morning.

22 MR. BOYD: Again, Thomas Boyd here on behalf of  
23 the Plaintiffs.

24 In her opening remarks, counsel for the Defendants  
25 emphasized that their arguments are based on a proper

1 reading of the statute. The Plaintiffs' challenges to this  
2 statute is based or are based on the plain language of the  
3 statute. We're relying on the actual words that the  
4 legislature used when they enacted this law rather than an  
5 after-the-fact interpretation or divining of what the  
6 legislature intended. So I stress that at the outset.

7 Our challenge is based on the plain language of  
8 the statute and the purposes of the statute as expressly  
9 stated by the legislature when it was enacted. Accordingly,  
10 there is no need for this Court to engage in any  
11 construction of the statute. The law as it applies to the  
12 construction are clear. If the statute is plain on its  
13 face, the Court will apply it based on those plain terms.

14 There also is a basis for a presumption against  
15 preemption in this instance because the statute far exceeds  
16 what could be fairly considered Minnesota traditional  
17 authority to regulate.

18 So what are the plain terms of the Next Generation  
19 Energy Act that we rely upon? I would begin by pointing to  
20 what is very evident from the language of the statute that  
21 it was plainly enacted to implement Minnesota's policies  
22 regarding global warming and greenhouse gases. Those are  
23 the words used in the statute. This is not an exercise of  
24 the state's traditional authority to regulate retail rates  
25 or serviceable electricity. This statute is entirely

1 focused on controlling or imposing the state's policies to  
2 control greenhouse gas emissions.

3 The statute expressly states: "It is the goal of  
4 the state to reduce statewide greenhouse gas emissions."  
5 The legislature could not be clearer in stating its purpose.  
6 There's no statement in the statute of any intent or goal to  
7 benefit retail customers. The statute focuses on emissions  
8 that occur when electricity is generated and the  
9 transactions involved in the sale of that electricity at  
10 wholesale.

11 The Next Generation Energy Act achieves this goal  
12 to "reduce statewide gas emissions" in three basic ways.  
13 First, the statute purports to grant to Minnesota the  
14 authority to impose its policies on greenhouse gas emissions  
15 that occur "outside the state" in the generation of  
16 electricity that occurs "outside the state." Minnesota's  
17 traditional authority has been limited to regulating the  
18 generation of electricity that occurs within Minnesota.  
19 Here, the statute purports to regulate emissions in other  
20 states that are already regulated by those other states.

21 The statute does this by redefining emissions that  
22 actually occurred outside the state as if they occurred in  
23 Minnesota, and defines them to be "statewide emissions" if  
24 the electricity is eventually consumed in Minnesota. This  
25 definitional slight of hand improperly allows Minnesota to

1 far expand its authority to regulate, which as I indicated  
2 has traditionally been limited to the generation activities,  
3 emissions that actually occur within its own borders.

4 The second way in which the statute achieves its  
5 goal to impose Minnesota's policies on greenhouse gases is  
6 to apply the statute to every party who may directly or  
7 indirectly participate in the generation, transmission, and  
8 sale or wholesale of that electricity associated with the  
9 emissions that occur outside of the state. The statute does  
10 this by providing "no person shall" engage in activities  
11 that would eventually cause the electricity to be consumed  
12 in Minnesota unless certain terms and conditions set forth  
13 in this statute are satisfied. The statute's broad "no  
14 person shall" restriction sweeps everyone into the scope of  
15 the statute.

16 THE COURT: They seem to argue that they are  
17 really only regulating the quality, if you will, of the  
18 product once it's here. And, for instance, they don't seek  
19 to regulate the terms of the transmission or the terms of  
20 any sale. Do you see that as a relevant distinction?

21 MR. BOYD: Well, I would challenge the  
22 distinction. They are not regulating the quality of the  
23 electricity. Instead, they are regulating the source of the  
24 electricity and imposing terms that would necessarily effect  
25 the wholesale transaction.

1 THE COURT: I see. So you're saying a term of the  
2 wholesale transaction is being regulated by this?

3 MR. BOYD: That's right.

4 THE COURT: I see. Not so much the transmission,  
5 but the term of the transaction, isn't it? There's nothing  
6 about the transmission that's being regulated necessarily.

7 MR. BOYD: Well, and I will address that in  
8 connection with their definition of a new large energy  
9 facility. We believe that the statute does purport to  
10 regulate transmission as well.

11 THE COURT: Okay.

12 MR. BOYD: And in terms of the terms and  
13 conditions that they apply to the transactions at wholesale,  
14 I'll also address that in just a moment. And I just wanted  
15 to finish, if I may, the point about the parties who are  
16 affected --

17 THE COURT: Sure.

18 MR. BOYD: -- and regulated by the statute.  
19 Ordinarily the MPUC would regulate investor-owned utilities  
20 and would deal with them in setting rates and so forth.  
21 This statute, because it says "no person shall," goes beyond  
22 just regulating investor-owned utilities and will also apply  
23 to cooperative generation and transmission providers who  
24 provide electricity at wholesale to rural electric systems  
25 and distribution cooperatives. It will apply and two

1 examples would be Basin Electric and Minnkota who are  
2 parties to this lawsuit. It applies to municipal power  
3 agencies including Missouri River Energy Service, who is  
4 also a Plaintiff in this case. Those entities provide  
5 electricity at wholesale to municipalities and municipal  
6 utilities. It applies to merchant power providers who  
7 generate and sell electricity at wholesale, and it applies  
8 to wholesale brokers of electricity who broker transactions  
9 for the sale of electricity at wholesale. The statute  
10 applies to all of these parties engaged in all of these  
11 activities regardless of whether they are occurring in  
12 Minnesota, and notwithstanding the fact that those are  
13 already regulated by FERC under the Federal Power Act.

14 The third way in which the statute imposes  
15 Minnesota's policies is to impose restrictions, terms and  
16 conditions on the generation and sale at wholesale of  
17 electricity associated with carbon emissions that have  
18 occurred outside of the state. The statute restricts all  
19 persons who would "import or commit to import" from outside  
20 of the state power from a new large energy facility that  
21 would contribute to statewide power sector carbon dioxide  
22 emissions.

23 By definition, these activities involve the  
24 generation of electricity. And by definition, these  
25 activities necessarily involve the sale of that electricity

1 at wholesale. These activities would not involve any retail  
2 step. This is not something that a retail consumer engages  
3 in. These are generation of wholesale activities.

4 You had asked whether or not we are arguing that  
5 the statute also regulates transmissions as well as the sale  
6 of wholesale, and we do make that allegation and it's based  
7 on the statute's incorporation of the definition for a new  
8 large -- for large energy facilities which are defined as  
9 including the transmission component.

10 Again, we're relying on the plain language of the  
11 statute. It was the legislature that chose to use that  
12 definition and the legislature incorporated it in its  
13 entirety. It did not indicate that it is incorporating part  
14 of it or that there's some limitations on it. So that's the  
15 basis for our argument that the statute also applies to  
16 transmission.

17 THE COURT: Going back for a moment to the  
18 wholesale transactions.

19 MR. BOYD: Yes.

20 THE COURT: The state argues that that wasn't  
21 adequately pled in your complaint. Do you have a response  
22 to that?

23 MR. BOYD: I do. I have to concede when I read  
24 *Twombly* and *Iqbal*, I can't say I'm an expert but I still  
25 believe that in federal court notice pleading is appropriate

1 and we've gone well beyond that. In looking at the  
2 complaint in preparation for the hearing I was struck by a  
3 few provisions.

4 First, in our claims regarding the preemption by  
5 the Clean Air Act, admittedly, that is a fairly concise  
6 statement when you get to Count II, but it's also on page 29  
7 of the complaint. So it incorporates everything that has  
8 come before by reference. And it specifically refers to the  
9 concept of field preemption when it states that pursuant to  
10 the Clean Air Act there exists "a scheme of federal  
11 regulation so pervasive as to make reasonable the inference  
12 that Congress left no room for the states to supplement it."  
13 I think that could be fairly construed as field preemption.

14 And then the next paragraph asserts: "The statute  
15 conflicts with the Clean Air Act because it purports to  
16 regulate emissions of carbon dioxide, a field that is  
17 regulated by Congress. The statute should therefore be  
18 stricken as unconstitutional."

19 So there are at least references to both conflict  
20 and field preemption. Again, admittedly, when stated there,  
21 that's a fairly succinct assertion; but again, it  
22 incorporates all the pleadings thus far in the complaint.

23 With regard to the Federal Power Act, which is  
24 Count III, we specifically allege field preemption when we  
25 state the United States expressly and exclusively regulates

1 the transmission of electric energy in interstate commerce  
2 and the sale of such energy at wholesale.

3 I would respectfully submit that we would not even  
4 have to allege that because under the *Attleboro* case from  
5 1927 and since that time, the law of this land has  
6 recognized that the states do not have that authority. So  
7 if anybody has that authority, it's the federal government  
8 whose got to step in and exercise that authority and they  
9 did. In response to the *Attleboro* case, Congress enacted  
10 the predecessor to the Federal Power Act and that same  
11 concept applies today in the Federal Power Act's current  
12 form. So there is no place for the states to regulate the  
13 flow of energy through interstate commerce and the sale of  
14 that energy at wholesale.

15 But we do go on and allege additional claims that  
16 I think further reflect both field and, if it's relevant,  
17 conflict preemption. So we believe that we have satisfied  
18 the pleading requirements.

19 THE COURT: Thank you.

20 MR. BOYD: With regard to the last point I was  
21 making on the plain language of the Next Generation Energy  
22 Act, I had already touched on the language that regulates  
23 importing or committing to import from outside the state  
24 power from a new large energy facility that would contribute  
25 to statewide power sector carbon dioxide emissions. Again,

1 those are generation and transmission and sale or wholesale  
2 activities. They are not retail purchases of electricity.

3 The statute also restricts all person who would  
4 "enter into a long-term power purchase agreement that would  
5 increase statewide power sector carbon dioxide emissions."  
6 Again, when the reference to emissions is something that is  
7 by definition associated with the generation of electricity,  
8 and the transaction relating to a long-term power purchase  
9 agreement is necessarily a transaction involving the sale at  
10 wholesale of electricity, that's not an agreement that the  
11 retail purchaser would enter into.

12 The statute's terms for these transactions -- or  
13 excuse me. The statute sets terms for these transactions by  
14 either indicating that they will be prohibited going back to  
15 the language of "no person shall" or they will be permitted  
16 only if the terms and conditions required in the statute are  
17 met, specifically the offset requirements that would entitle  
18 the persons involved in the transaction to obtain an  
19 exemption.

20 Counsel referenced to the function of the state in  
21 doing resource planning. There is an integrated Resource  
22 Planning Statute. That statute came into place as a result  
23 of a congressional edict. The integrated resource planning  
24 requirements were set forth in an amendment to the Public  
25 Utilities Regulation Policy Act back in 1992. The following

1 year Minnesota enacted its own integrated Resource Planning  
2 Statute. That function has been ongoing since that time.  
3 The focus and purpose is to use those plans to try and  
4 provide energy to retail customers at the least cost.  
5 That's the focus of the analysis that the PUC would have  
6 when they are reviewing those plans. It's a least cost  
7 planning tool. And as such a plan or as such a tool, the  
8 parties involved in those plans are expected to look at a  
9 variety of different sources for energy, including renewable  
10 sources.

11 The purpose and the point there is to focus on  
12 potential low cost sources. I would come back to the  
13 purpose of this statute, the Next Generation Energy Act,  
14 which focuses on greenhouse gas emissions. It does not  
15 address the low cost objective in any respect. It's not a  
16 resource planning document.

17 I would also point out that there's nothing in the  
18 statute, the Resource Planning Statute, which is 216B.2422,  
19 that authorizes the state to dictate the terms in which  
20 someone, a party who is regulated, an investor-owned  
21 utility, for example, the statute itself doesn't authorize  
22 the state to dictate what the terms of the wholesale  
23 purchase of that electricity, if renewables or otherwise,  
24 will be.

25 THE COURT: Mr. Boyd, just come closer to the

1 mike. Thanks.

2 MR. BOYD: Certainly given that the integrated  
3 Resource Planning Statute has been in place since 1992 and  
4 has apparently worked just fine, it certainly is not -- it  
5 certainly is not in need of the Next Generation Energy Act  
6 in order to facilitate that process. And by arguing that  
7 the Next Generation Energy Act is unconstitutional, that  
8 does not displace or abrogate or abolish the integrated  
9 resource planning process or statute.

10 Counsel also referred to -- I believe you had  
11 asked whether there were any cases on point and I'm  
12 certainly not aware of any cases that would uphold this type  
13 of exercise of authority. There was a reference to a  
14 California statute and counsel did acknowledge that the  
15 constitutionality of that statute has not yet been addressed  
16 and that's certainly a point we wish to underscore. That  
17 statute, by the way, is much narrower than the Next  
18 Generation Energy Act. It focuses rather than on all  
19 parties, it focuses on retail utilities and it does provide  
20 standards. Even at that, we would question the  
21 constitutionality of the statute but we would note that it's  
22 much narrower than the statute Minnesota enacted.

23 Minnesota quite simply does not have the  
24 authority, much less any traditional authority, to regulate  
25 outside its borders. States cannot regulate emissions that

1 occur in other states. States cannot regulate generation  
2 facilities located in other states, and states do not have  
3 the authority to regulate the transmission or sale at  
4 wholesale of electricity flowing through interstate  
5 commerce.

6 Minnesota's efforts to regulate and impose its  
7 policies regarding greenhouse gases by restricting and  
8 imposing terms and conditions on the generation of  
9 electricity in other states and in transactions for the sale  
10 at wholesale of that electricity flowing through interstate  
11 commerce violates the commerce clause which is alleged in  
12 our complaint. And we realize we're not addressing that  
13 today, but it is also preempted by the Federal Power Act and  
14 the Clean Air Act and I'll turn briefly to those claims.

15 Congress has clearly determined the federal  
16 government will regulate the transmission and sale at  
17 wholesale of electric energy in interstate commerce. As I  
18 mentioned earlier, the 1927 case from the US Supreme Court,  
19 the *Attleboro* case, held that the states do not have the  
20 authority to engage in that kind of regulation. Therefore,  
21 it was up to Congress to step in and Congress indeed  
22 interpreted *Attleboro* as prohibiting state control at  
23 wholesale rates in interstate commerce for resale.

24 And so it armed the Federal Power Commission and  
25 now the Federal Energy Regulatory Commission, FERC -- I hope

1 I read that right. I'll just stick with FERC. But Congress  
2 has enacted these laws and has charged FERC with precisely  
3 that power to regulate the transmission of its electricity  
4 and its sale at wholesale.

5 The only limit on its federal authority relates to  
6 a local state's authority over generation facilities used in  
7 local distribution within the state and the transmission of  
8 intrastate electricity; again, focusing on what's going on  
9 within the state. The state does not have the authority to  
10 go beyond its borders.

11 The Next Generation Energy Act is preempted by the  
12 Federal Power Act because it seeks to do just that. To  
13 control transactions involving the transmission, sale of  
14 electricity at wholesale. The regulation of the sale at  
15 wholesale is the exclusive province of the federal  
16 government. As I mentioned, the statute imposes terms and  
17 restrictions on these types of transactions when it provides  
18 that "no person shall import or commit to import from  
19 outside the state power from new large energy facilities"  
20 and that "no person shall enter into a new long-term power  
21 purchase agreement."

22 I realize I've said this before so I want to avoid  
23 being redundant; but, again, those by their very nature are  
24 activities involving the generation, transmission, and sale  
25 at wholesale of electricity. Those are clearly subject to

1 the Federal Power Act and clearly beyond the state's  
2 authority.

3 THE COURT: So if the state wants to protect the  
4 quality of its air and control greenhouse gas emissions and  
5 the like, are you saying that because by necessity the state  
6 has to look outside its borders to purchase energy, it's  
7 without authority to control them?

8 MR. BOYD: I am. I would assert very clearly they  
9 are without authority to do that. That's not to say they  
10 are without recourse. They certainly have other  
11 alternatives and there are other ways of addressing their  
12 policy concerns. But because we're part of a united set of  
13 states and we have a federal government and there are  
14 certain boundaries, the state cannot take it upon itself to  
15 foist its policies on neighboring states unless it can  
16 succeed in these other alternatives.

17 THE COURT: But if the state were to change the  
18 statute, as California apparently has done, to focus on what  
19 retail utilities within the state can do and limit their  
20 authority there, and then leave it to retail utilities to  
21 figure out how to make this happen with power coming outside  
22 of the state, that would be acceptable or not acceptable?

23 MR. BOYD: It's a bit of a hypothetical. I  
24 suspect it would not be acceptable. I think that the  
25 approach would be going through the established mechanisms

1 rather than creating a state law that would have the effect  
2 of controlling the flow -- the terms and conditions of  
3 transactions involving the flow of electricity through  
4 interstate commerce.

5 One very practical mechanism that they could  
6 pursue would be to try on develop some kind of agreement  
7 among the states. There is precedent for that. As I  
8 understand it, that has occurred in the northeastern part of  
9 the country where they have developed -- a group of states  
10 have agreed to a cooperative agreement that's referred to as  
11 the Regional Greenhouse Gas Initiative. And more close to  
12 home, as I understand it, the Midwest Governors Association  
13 also developed something that became known as the Midwest  
14 Greenhouse Gas Accord, which had ambitions to be similar to  
15 the Regional Greenhouse Gas Initiatives. But as with both  
16 of these approaches, they had to be ratified by the state  
17 legislature.

18 So that's one approach. To go to the other  
19 states, try and reach agreement, some kind of a compact.  
20 And by the way, these are agreements and compacts that are  
21 approved of and encouraged under the Clean Air Act. So  
22 these aren't states that are sort of ad libbing. This is  
23 part of the policy that's been encouraged under the Clean  
24 Air Act. And particularly I would refer to Title 42 USC  
25 7402(c). So that's one approach. And in fact the Next

1 Generation Energy Act even recognized that that was an  
2 approach and charged the Commissioner of Commerce to pursue  
3 those types of activities.

4 In some instances those will bear fruit. In other  
5 instances there may not be agreement and ratification by the  
6 state legislators. But that's a legitimate process and an  
7 appropriate process. And if Minnesota's legislature chooses  
8 not to adopt the Midwest Greenhouse Gas Accord, they can't  
9 then unilaterally decide we're going to go ahead and just  
10 enforce our policies on all of these states.

11 Another approach, of course, would be through the  
12 federal government. One of the unsuccessful recent efforts  
13 along those lines involved the Kyoto Treaty where nations  
14 negotiated a treaty but it was still up to the Senate to  
15 ratify. That didn't happen. But at least recently the EPA  
16 has proposed some regulations that would apply to carbon  
17 limits on new power plants. Those are controversial issues.  
18 But that recent announcement by the EPA demonstrates that  
19 the federal regulatory process is the place where those  
20 issues may and in fact are being debated and in some cases  
21 litigated. But those are forums that are available to all  
22 that are appropriate and have been designed to be inclusive  
23 and to involve the states and other interest groups.

24 As we were discussing that, I think I touched on a  
25 number of the arguments that I intended to make relating to

1 the Clean Air Act. I do want to emphasize a few things  
2 about how the Clean Air Act is structured. The Clean Air  
3 Act provides for a partnership between the federal  
4 government on the one hand and the individual states. But  
5 that partnership with the individual states focuses on the  
6 state as the source of emissions. It doesn't deputize the  
7 state to go across its borders and start imposing  
8 restrictions on neighboring states. It's the source state  
9 and our brief gets into that with a number of examples of  
10 how the Clean Air Act, as well as the Federal Power Act,  
11 recognize that the states have an interest and a right to be  
12 engaged in the regulation of what's going on within their  
13 borders. But they do not have the authority, certainly  
14 don't have a traditional authority, to go beyond their  
15 borders.

16 Your Honor, I believe that's all I have in terms  
17 of the preemption arguments. We would otherwise rest on our  
18 brief with regard to those arguments. We also would refer  
19 to our briefs as well as our complaint with respect to real-  
20 life illustrations of how the Next Generation Energy Act has  
21 impacted our clients as well as others who are attempting to  
22 engage in transactions involving the sale of electricity at  
23 wholesale and are being burdened and inhibited by this  
24 statute.

25 The examples include Basin Electric, Missouri

1 River Energy Services and Great River Energy's Spiritwood  
2 Station cases. And because those are addressed at length in  
3 our complaint and our brief, I'll just ask the Court to  
4 refer to those.

5 With regard to the remaining claims, the  
6 procedural due process claim, I believe that's been  
7 adequately and appropriately briefed.

8 With respect to the joining of the Attorney  
9 General as a proper party, I did want to touch on that and  
10 underscore that the reason why we brought the Attorney  
11 General in as a party is because the statute in our view  
12 clearly provides the Attorney General with discretion that  
13 is not conditioned on being asked to enforce. That the  
14 statute provides the Attorney General with discretion to  
15 enforce the statute on her own without being asked to do  
16 that. Under *Ex Parte Young* and the cases that have  
17 interpreted that precedent, all we need to demonstrate is  
18 that the officer has some connection with the enforcement of  
19 the act and that's sufficient to justify naming that officer  
20 as a party. If the officer has some discretion to determine  
21 when to enforce a particular law, then there is that  
22 connection that makes them a proper party.

23 The second sentence of Section 216H.03 subdivision  
24 8 says: "This section may be enforced by the attorney  
25 general on the same basis as a law listed in Section 8.31

1 subdivision 1." And we believe that that is a plain  
2 indication by the legislature that the Attorney General has  
3 discretion to enforce the statute and effectively adds the  
4 Next Generation Energy Act to the list of statutes that are  
5 otherwise listed in Section 8.31 subdivision 1.

6 We recognize that the Defendants have argued that  
7 the second sentence of that subdivision has to be read in  
8 tandem with the first sentence. We don't disagree that that  
9 may be one way to read the provision, but we would suggest  
10 that that's not the only way to read the provision. We  
11 believe the legislature was clear in indicating in the first  
12 sentence that the Department of Commerce or the Public  
13 Utilities Commission could ask the Attorney General to look  
14 into violations and the Attorney General would have to do  
15 that.

16 But separate from that, we believe the second  
17 sentence was an indication by the legislature that the  
18 Attorney General could otherwise exercise its own discretion  
19 without having been asked. So that second sentence  
20 indicates in our reading that the authority and discretion  
21 is not conditioned. Because that's how we interpret it,  
22 we've named the Attorney General as a party. Also because  
23 that's how we have interpreted it, that it's not a  
24 conditional authority, there's no need to assert that  
25 there's been a threat by the Attorney General to enforce the

1 statute. That's something that the Defendants have argued  
2 and they have provided some authority but not an Eighth  
3 Circuit decision to support the argument that you need both  
4 a connection and a threat.

5 Lastly, your Honor, with regard to the privileges  
6 and immunities claim, that was pleaded largely as a  
7 companion claim with respect to the commerce clause. It's  
8 pleaded -- it was pleaded in a sense to emphasize the  
9 mutually-reinforcing relationship between the privileges and  
10 immunities clause and the commerce clause. With respect to  
11 that claim, we will recognize that that's still a claim that  
12 needs to be developed and we believe it would be  
13 inappropriate to dismiss that claim at this time before the  
14 parties and before the Plaintiffs have engaged in discovery.

15 I believe that's all I have, your Honor.

16 THE COURT: Thank you, Mr. Boyd.

17 MR. BOYD: Thank you.

18 THE COURT: Ms. Cochran, a brief response?

19 MS. COCHRAN: Thank you, your Honor. I would like  
20 to respond to a few of the points that Mr. Boyd made.

21 First of all, Defendants' memoranda are based on  
22 the plain language of the statute. The plain language of  
23 the statute supports, fully supports, Defendants' arguments  
24 and position. And that's clear in the statute with its  
25 focus on seeking to limit contributions and increases to the

1 statewide power sector carbon dioxide emissions.

2 Second of all, Mr. Boyd stated that environmental  
3 concerns are not an area of traditional state authority.  
4 Defendants respectfully disagree. Environmental concerns  
5 have traditionally been taken into account in resource  
6 planning decisions and both Resource Planning Statutes and  
7 Rules reflect that. Furthermore, environmental concerns  
8 more broadly are an area of traditional state authority.

9 Third, Minnesota is in no way imposing its  
10 policies on other states. Nothing in this statute affects  
11 emissions in North Dakota or any other state. Minnesota  
12 simply is seeking to take responsibility for the type of --  
13 and take into account environmental considerations in the  
14 type of power that's used in the state. The statute doesn't  
15 apply to entities outside of the state. It is a Minnesota  
16 statute so by its terms it applies to entities operating in  
17 the state.

18 It doesn't apply to power producers in other  
19 states or generators in other states or transmission  
20 providers in other states as I believe Mr. Boyd was  
21 incorrectly suggesting. It applies to the entities who are  
22 providing power for use to -- for use by retail customers in  
23 the state. And it limits the use. It doesn't impose any  
24 terms or conditions on the transmission itself. It doesn't  
25 impose any terms or conditions on the wholesale sale.

1 Prohibiting or limiting the use is not setting a term. It's  
2 making a resource generation choice.

3 THE COURT: Where in the statute does it clearly  
4 state that it's limiting its scope only to retail utilities  
5 in Minnesota?

6 MS. COCHRAN: Your Honor, I'm sorry if I --  
7 perhaps I didn't state that correctly. The power is power  
8 used by retail customers in the state. The entities that  
9 provide that power to customers in the state could be retail  
10 utilities or they could be wholesale utilities like Basin or  
11 MRES who are Plaintiffs to this lawsuit. However, Minnesota  
12 Resource Planning Statutes also apply to these entities  
13 because they provide power to -- indirectly to customers in  
14 the state. So the state has an interest in regulating all  
15 entities that provide power for use by retail customers in  
16 the state.

17 THE COURT: So say that again. You're saying that  
18 the state's Resource Planning regulations regulate entities  
19 outside of the State of Minnesota?

20 MS. COCHRAN: No, no, I'm sorry. They regulate  
21 entities who do business in this state. MRES and Basin do  
22 business in this state.

23 THE COURT: So entities outside the State of  
24 Minnesota who do business in the State of Minnesota?

25 MS. COCHRAN: Yes. But not a generator, not an

1 independent power producer in another state that an MRES or  
2 a Basin might buy power from, or the seller in part of a  
3 power purchase agreement. The statute is focused on  
4 entities operating in Minnesota. That's the clarification I  
5 meant to make. It's not regulating entities operating  
6 outside of the state.

7 THE COURT: Okay.

8 MS. COCHRAN: Also --

9 THE COURT: So those entities could transmit  
10 electricity that fails to meet the requirements of the  
11 statute without any consequences. Is that what you're  
12 saying?

13 MS. COCHRAN: Yes, it's only an entity that's  
14 seeking to bring the power into Minnesota for use in  
15 Minnesota by Minnesota -- for ultimate use by Minnesota  
16 retail customers. But it would only --

17 THE COURT: I'm sorry. So there's entities  
18 outside of Minnesota who transmit the power into Minnesota  
19 that are regulated by this statute?

20 MS. COCHRAN: No, I'm sorry. Let me try again.  
21 It wouldn't be the entity outside of Minnesota that's  
22 transmitting it. It would be entity that's seeking to bring  
23 it into Minnesota that operates in Minnesota and is seeking  
24 to bring that power in Minnesota for ultimate use in  
25 Minnesota by retail customers.

1 THE COURT: You know, I think one thing that would  
2 be helpful for the Court is to identify the players. Who  
3 are the players in this industry. What is their role and  
4 how do they get electricity to the State of Minnesota.  
5 Because I'm not sure I'm clear about what you disagree about  
6 on this point. So maybe in supplemental briefing you could  
7 try now to just generally explain that to me.

8 MS. COCHRAN: Sure. There's a whole range of  
9 players, as Mr. Boyd mentioned. There are independent power  
10 producers who own facilities that don't have retail or  
11 wholesale customers. There are wholesale providers who  
12 provide power either that they generate themselves or that  
13 they acquire from others that provide power to smaller  
14 utilities which are retail distribution utilities. There  
15 are also public utilities which are investor-owned utilities  
16 that are large utilities like an Xcel, Minnesota Power, that  
17 generate power themselves and enter into power purchase  
18 agreements.

19 And I guess the point I was trying to make is that  
20 this law is concerned with persons operating in Minnesota  
21 that are bringing power in Minnesota. It's not the  
22 independent power producer, generator in another state.  
23 It's not a transmission provider in another state. But the  
24 person operating that seeks to import the power into  
25 Minnesota or enter into a power purchase agreement for use

1 of power in Minnesota. It's only persons operating in  
2 Minnesota. They may be based in another state but the  
3 reason they are subject to it is because they are operating  
4 in Minnesota.

5 THE COURT: Well, okay. So explain to me, that  
6 would apply to wholesale providers and investor-owned large  
7 utilities located, physically located, outside of Minnesota;  
8 is that correct? To they extent that they seek to bring  
9 power into Minnesota.

10 MS. COCHRAN: But they would only be bringing  
11 power into Minnesota if they had -- if there were customers,  
12 either retail or wholesale, to be served in Minnesota.

13 THE COURT: Sure. They are trying to sell their  
14 power to wholesale customers in Minnesota.

15 MS. COCHRAN: Yes.

16 THE COURT: So we have entities outside of  
17 Minnesota, like a wholesale provider, whose job it is is to  
18 provide or transmit electricity to somebody in Minnesota, am  
19 I right? But we're not at the retail level yet.

20 MS. COCHRAN: You could be at the retail or  
21 wholesale level.

22 THE COURT: My concern is those people are  
23 regulated by other laws. They are regulated by federal laws  
24 that --

25 MS. COCHRAN: Well --

1 THE COURT: And so what if they are inconsistent  
2 with each other?

3 MS. COCHRAN: Your Honor, in your example the  
4 transmission provider would not be subject to this statute.  
5 It's the person that is buying the power for use in  
6 Minnesota that's subject to it. The transmission -- this  
7 law isn't regulating transmission providers. People that  
8 are importing power, importing energy for use, they are not  
9 ordering -- it's not regulating transmission. It's  
10 regulating import of energy. So it's the energy that is the  
11 focus of the law. It's not the transmission. And the law  
12 would only regulate an entity that's importing that operates  
13 in Minnesota that imports power for use in Minnesota because  
14 the law is focused on power that is consumed in Minnesota.  
15 So it's not a transmission provider that would be subject.  
16 It would be an entity that's --

17 THE COURT: But it could be an out-of-state  
18 wholesale provider.

19 MS. COCHRAN: Only if they were doing business in  
20 Minnesota.

21 THE COURT: Right. Doing business through  
22 interstate commerce, right?

23 MS. COCHRAN: Yes. But that is not the regulation  
24 of a wholesale sale. It's not setting any rates or terms of  
25 a wholesale sale. And in doing resource planning, states

1 make decisions about what resources should be used in the  
2 state, what resources should be purchased and what resources  
3 should be built. And it's not just resources in the state  
4 because utilities that operate in Minnesota, a number of  
5 utilities like Xcel and Otter Tail Power operate in multiple  
6 states. So they may have generation facilities in Minnesota  
7 as well as in other states. But in doing resource planning,  
8 the state looks at resource options in the state and outside  
9 of the state because all resource -- because of the nature  
10 of the electric system resources from both within the state  
11 and out of the state can be used to serve customers.

12 So the states have authority to consider what --  
13 which resources should be used regardless of where they are  
14 located. And that's all this law is doing is saying we're  
15 not going to use certain types of power because of  
16 environmental concerns unless we offset the emissions. And  
17 we're not discriminating -- I mean, the law applies  
18 regardless of where the power is located. But it only  
19 applies if the power is consumed in Minnesota. So it's  
20 concerned about imports for consumption in Minnesota. Only  
21 for persons operating in Minnesota.

22 THE COURT: So would all the Plaintiffs in this  
23 case in your view be regulated by this law?

24 MR. BOYD: Not all of the Plaintiffs, your Honor.  
25 Only the utilities Plaintiffs who are currently regulated by

1 Minnesota Resource Planning Statutes as well.

2 THE COURT: So let's walk through the Plaintiffs.

3 MS. COCHRAN: Sure.

4 THE COURT: Who would not be regulated and who  
5 would be?

6 MS. COCHRAN: Your Honor, the State of North  
7 Dakota would not be regulated because it does not import  
8 power for use or consumption in Minnesota. The Industrial  
9 Commission does not -- likewise would not be. The Lignite  
10 Energy Council would not be. The Basin Electric Power  
11 Cooperative could be. The North American Coal Corporation  
12 would not be. Great Northern Properties Limited Partnership  
13 would not be. Missouri River Basin Power Agency could be.  
14 Minnkota Power could be.

15 THE COURT: So is there a standing issue with  
16 respect to Plaintiffs who you don't believe in any  
17 circumstances would be regulated by the statute?

18 MS. COCHRAN: Your Honor, well, certainly we think  
19 there are standing issues in relation to the commerce clause  
20 which we will raise at a later date. But --

21 THE COURT: I don't know how Plaintiffs could  
22 challenge --

23 MS. COCHRAN: My understanding, your Honor, is  
24 that if any one Plaintiff has standing, all Plaintiffs are  
25 proper parties based on my review of the prior case law.

1 So --

2 THE COURT: Okay.

3 MS. COCHRAN: But the focus on the statute is on  
4 power consumed in Minnesota. So it's only regulating  
5 persons who are importing power for consumption in  
6 Minnesota. It's not regulating generation in another state  
7 or transmission in another state. I'm sorry if I confused  
8 the Court on that point.

9 Also I'd just like to address the *Attleboro* case  
10 briefly that Mr. Boyd mentioned. That case involved rates  
11 for wholesale sales. That's not at all an issue here. The  
12 statute in no way regulates wholesale rates.

13 And with regard to your question about whether a  
14 law that -- if the law was redrafted to be focused on retail  
15 utilities, whether that would be acceptable, I think  
16 Mr. Boyd's response shows the problem of the Plaintiffs'  
17 position in this case. Mr. Boyd's response said -- Mr. Boyd  
18 said he didn't think that would be acceptable. That  
19 response is inconsistent with the Federal Power Act. The  
20 Federal Power Act preserves state's authority over retail  
21 sales and resource planning. And they are basically  
22 advancing the same argument in this state.

23 Furthermore, it's illogical -- Mr. Boyd said the  
24 state could take a regional approach to addressing air  
25 emissions. It's illogical to say that the state can't make

1 decisions about the type of resources used in the state.  
2 The state has historically done that. It's well within its  
3 traditional authority. And yet somehow it could undertake a  
4 regional approach. There's simply no support for that  
5 position. It's just logically inconsistent.

6 And finally, on the preemption issues, the Clean  
7 Air Act sections that Mr. Boyd cited to regarding the  
8 regulation of sources in other states, those sections, as I  
9 mentioned earlier, relate to criteria pollutants so they  
10 don't have any relevance to this statute. But in any event,  
11 this statute in no way is regulating emissions in other  
12 states. So it's simply not preempted by the Clean Air Act.

13 And finally, I would just like to briefly respond  
14 to Mr. Boyd's statements regarding whether the AG is a  
15 proper defendant. Section 216H.03 enforcement provision,  
16 subdivision 8, is a conditional grant of the authority to  
17 the AG. It's conditioned on a referral from the Department  
18 of Commerce or the Public Utilities Commission. It's not --  
19 it does not provide independent authority. In fact, the  
20 first sentence would be meaningless.

21 The second -- under Mr. Boyd's interpretation, the  
22 second sentence only addresses remedies. And as we noted in  
23 our memoranda, the *Reproductive Health*, that's the Eighth  
24 Circuit case, says that conditional authority is not enough  
25 to make the Attorney General a proper party.

1           You know, another important factor to consider in  
2 looking at this issue is that the right defendants are here.  
3 There is no need for the Attorney General to be a party to  
4 this case. And to include the Attorney General as a party  
5 offends the dignity of the state because it's a back-door  
6 attempt to make the state a party to the case.

7           In conclusion, Defendants would respectfully  
8 request that our motion be granted and that Counts II  
9 through VI be dismissed, and that the Attorney General as a  
10 Defendant be dismissed as well. Thank you.

11           THE COURT: Thank you.

12           Mr. Boyd, do you wish to make a few remarks?

13           MR. BOYD: Yes, your Honor. I will try to be very  
14 direct.

15           First, if in fact the Next Generation Energy Act  
16 was or is the exercise of the state's traditional authority  
17 to oversee and regulate resource planning, then there would  
18 be cases that would support that kind of exercise,  
19 essentially using the importation of energy as a lever to  
20 then impose terms and conditions on the transactions that  
21 bring that energy to the state through interstate commerce.  
22 There are no such cases because the Court or the state does  
23 not have that authority.

24           You had asked some questions about who was  
25 regulated by this statute. And I go back to the same

1 language. Everyone is regulated by it. The statute says  
2 "no person shall". It doesn't specify who those persons  
3 are. It applies to all persons who engage in the  
4 transactions that are defined by the statute. And all those  
5 persons are restricted, either prohibited from participating  
6 in these transactions and activities or required to accept  
7 certain terms and conditions in a wave of offsets. There's  
8 always by definition two parties to every transaction. By  
9 arguing that the transaction involves one party in  
10 Minnesota, someone who is "importing" the electricity into  
11 Minnesota, looks at only part of the transaction. That  
12 transaction has at least one other party, often times out of  
13 the state. And it could involve a host of different players  
14 who are engaged in the sale and wholesale of that  
15 electricity. And this statute, its breadth, its reach,  
16 applies to those other parties.

17 You had asked specifically about what types of  
18 parties might be or persons might be subject to this  
19 regulation and Basin Electric's name came up and of course  
20 they are a party to this action. And I wanted to just take  
21 a moment to use them as an example.

22 Basin is a North Dakota nonprofit wholesale  
23 generation/transmission cooperative who provides electricity  
24 at wholesale to its member of rural electric systems. It  
25 has a generation facility in Dry Fork, Wyoming. It

1 transfers energy from that station into the Western  
2 Interconnection Power Grid. Recently there's been an  
3 increase in power demand in North Dakota and, because of  
4 that, Basin has transferred that electricity through a  
5 switch in Rapid City into the Eastern Interconnection to  
6 serve those North Dakota residents.

7 It has been suggested, and there's currently  
8 paperwork being provided to the PUC, it's been suggested  
9 that because they transferred that energy from the Wyoming  
10 station into the Eastern Interconnection to serve the North  
11 Dakota customers, that the Next Generation Energy Act may  
12 apply because some of that electricity may, hypothetically  
13 may, end up in Minnesota with the rural electric systems  
14 that Basin serves in Minnesota.

15 So that's a pretty wonderful example of how broad  
16 this statute applies if you look at the plain language. In  
17 fact, how people have been advocating it should apply to  
18 Basin in that situation.

19 Lastly, your Honor, on the point regarding  
20 standing -- actually two lastlies. I'm sorry. On the point  
21 regarding standing, I agree with counsel for Defendants.  
22 It's my understanding that the Eighth Circuit law is that if  
23 standing applies for one, standing is good for all. We  
24 believe that standing is good for all with regard to North  
25 Dakota and the Industrial Commission and the Energy

1 Commission and its council and its members. There are  
2 chilling effects that have been caused by the statute that  
3 make them proper parties and give them standing.

4 Lastly, with regard to the Eighth Circuit's case  
5 in *Reproductive Health*, looking at that case carefully I  
6 think demonstrates that the Eighth Circuit was focused on  
7 whether or not there was conditional authority. And in that  
8 case I believe the Attorney General could only act if the  
9 Governor instructed the Attorney General to act or a court  
10 required the Attorney General to act. The court said that  
11 makes the Attorney General potentially an appropriate party  
12 but not necessarily a proper party at that time.

13 Here, our reading of the second sentence of that  
14 subdivision would give the Attorney General discretion to  
15 act without being requested to do so by the Department of  
16 Commerce or the PUC.

17 Thank you, your Honor.

18 THE COURT: Thank you.

19 Anything further? Have I heard everyone out  
20 today?

21 Very good. This case has been very well briefed  
22 and very well presented. Both sides should be very pleased  
23 with that. The Court will study it and take it under  
24 advisement. Court is adjourned.

25 (Court adjourned at 10:47 a.m.)

1 \* \* \*

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3  
4 I, Carla R. Bebault, certify that the foregoing is  
5 a correct transcript from the record of proceedings in the  
6 above-entitled matter.

7  
8  
9 Certified by: s/Carla R. Bebault  
10 Carla Bebault, RMR, CRR, FCRR  
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