UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc., 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.	No.: 11-CV-3232 (SRN/SER) **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Minn. Stat. §216H.03 is not a traditional resource planning statute, nor is it a lawful extension of Minnesota's traditional regulatory authority over utilities. Instead, §216H.03 regulates parties and transactions that Minnesota has not traditionally regulated. And the statute does so in a manner that directly and substantially burdens interstate commerce, and regulates in areas exclusively reserved to the federal government under the Federal Power Act ("FPA") and the Clean Air Act ("CAA"). Therefore, it is unconstitutional.

FACTS

I. DEFENDANTS HAVE OVERSTATED MINNESOTA'S TRADITIONAL REGULATION OF UTILITIES.

Minnesota's traditional regulation of utilities has focused on regulation of "public utilities" which are statutorily defined as "persons, corporations, or other legal entities…operating, maintaining, or controlling ***in this state*** equipment or facilities for furnishing ***retail*** natural, manufactured or mixed gas or electric service to or for the public or engaged in the production and ***retail sale*** thereof." (ECF 171 at 3, quoting Minn. Stat. §216B.02, subd. 4(1)(emphasis added)) Public utilities are generally vertically integrated entities that own generation and transmission, ***and*** most importantly, serve retail customers. Municipal and cooperative utilities are expressly excluded from the statutory definition of "public utilities" that the MPUC regulates. (*Id.*) Cooperatives and municipalities are typically self-regulated, and participate in multi-state region-wide organizations which are financially responsible for procuring resources and wholesale power for their regional membership. (ECF 174, ¶¶3-11; ECF 175, ¶¶3-10; ECF 176, ¶¶3-10)

Defendants' own expert agrees that resource planning decisions of cooperatives and municipally-owned utilities have not traditionally been regulated by states. (Blumsack Dep. at 150:5-12, Second Suppl. Boyd Decl., Ex. CC) Minnesota had not attempted to regulate Basin's, Minnkota's, and MRES's resource planning activities before enactment of §216H.03. (ECF 175, ¶12; ECF 176 ¶12) While utilities like Basin, Minnkota, and MRES, historically filed resource plans, the MPUC could only issue "advisory" determinations regarding these resource plans. Minn. Stat. §216B.2422, subd. 2.

Minnesota's limited regulatory focus on "public utilities" conforms to FERC's general description of the states' traditional regulatory authority. *See* FERC Order 888, 61 FR 21540, 21626 n.544 (May 10, 1996)("This Final Rule will not affect or encroach upon state authority in such traditional areas as the ***authority over local service issues,*** including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM; authority over utility generation and resource portfolios; and authority to impose non-bypassable or retail stranded cost charges.")(emphasis added).[1] Minn. Stat. §216H.03 exceeds this traditional

[1] Defendants have quoted this footnote from FERC Order 888 on multiple occasions, but have consistently omitted the language making clear that the footnote was describing traditional authority in "local" distribution and "retail" activities. (*See* ECF 166 at 4) Moreover, this footnote immediately followed a sentence regarding "traditional regulation of the ***retail market.***" *See* Order 888, 61 FR at 21626 (emphasis added).

state-regulatory "authority over local service issues" by prohibiting and imposing terms on transactions involving out-of-state parties responsible for procuring wholesale power for their regional membership rather than serving in-state retail customers.

II. MINN. STAT. §216H.03 EXCEEDS MINNESOTA'S TRADITIONAL REGULATORY AUTHORITY

Minn. Stat. §216H.03 is not limited to regulating resource portfolios of "public utilities," nor does it encourage diversification in resource portfolios. Instead, §216H.03 categorically states "no person shall" engage in certain energy import transactions and wholesale contracts. Previously unregulated out-of-state entities like Basin, Minnkota, and MRES are not merely subject to an "advisory" finding by the MPUC; rather, violations of §216H.03 will subject these parties to the impractical and uncertain "offset" requirements, and the prospect that either MDOC or MPUC will refer violations for prosecution. Minn. Stat. §216H.03, subds. 4&8.

A. Minn. Stat. §216H.03's Regulates Both Capacity and Power.

Defendants insinuate that §216H.03 is simply a traditional resource planning directive regarding diversification of resource ***capacity***. However, §216H.03 is non-traditional as it actually strips utilities of their decision-making authority to engage in particular types of transactions; and §216H.03 expansively extends to out-of-state generation, transmission, and interstate wholesale sales of energy through its express application to ***power*** and ***energy.***

Power is electricity generated at any given instant; ***energy*** is power over time; and ***capacity*** is the potential to make power if needed. (*See* Raatz Dep. at 28:4-30:19, Second

Suppl. Boyd Decl. Ex. FF; Porter Dep. at 50:25-52:2, Second Suppl. Boyd Decl. Ex. DD; Wahle Dep. at 71:16-72:10, Second Supp. Boyd Decl. Ex. GG) In the electric industry, ***import*** typically describes actual physical transmission of ***energy***. (*See* Porter Dep. at 197:2-200:2; Hempling Dep. at 16:8-16, Second Suppl. Boyd Decl. Ex. EE) In turn, ***power*** is a phrase associated with ***energy*** (which is power over time) not ***capacity*** (which is the potential to generate power). (Hempling Dep. at 125:15-126:2, 127:11-17; Blumsack Dep. at 15:24-16:5) The statute's use of each of these terms reveals the true, expansive scope of §216H.03.

Subdivision 3(2) makes it unlawful to "***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." (Emphasis added). The terms "import" and "power" establish that §216H.03 applies to the transmission of energy that has been generated—not the "capacity" to generate power.

Subdivision 3(3) separately makes it unlawful to "enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions. For purposes of this section, a long-term power purchase agreement means an agreement to purchase 50 megawatts of ***capacity*** or more for a term exceeding five years." (Emphasis added). Merely entering into a contract for ***capacity*** does not result in emissions; nor does it mean that all power that could be generated from that resource will be consumed in Minnesota.

In the MISO market, when parties enter into a contract for ***capacity***, there is no certainty as to the extent to which that generation resource will actually generate electricity—and corresponding emissions—nor is there any certainty as to how much electricity that resource will generate or where that electricity will be "consumed." (ECF 138, Ex. A, ¶¶30-31) The resources that are the subject of capacity contracts are offered into the MISO market just like all other available resources. (*Id.*) The market ultimately determines which generation facilities operate, and how much energy each generates based on the offers and bids in the MISO market. (*Id.*) It is not until that generation facility is actually dispatched ***by MISO*** that emissions will be generated and "power" from a new long-term power purchase agreement will potentially "contribute to statewide power sector carbon dioxide emissions."[2]

B. Minn. Stat. §216H.03 Regulates Imports of Power Occurring Through the MISO Markets.

Because §216H.03, subd. 3(2) prohibits "imports" of certain "power," it necessarily applies to transactions in the MISO energy market. Defendants previously admitted §216H.03 applies to energy purchases in the MISO market. (ECF 138, Ex. U at 11-12) However, Defendants now attempt to construe §216H.03 in a manner that excludes MISO-related transactions. (ECF 166 at 7-8)

The statute plainly and categorically applies to all ***imports*** of ***power*** from new large energy facilities. Minn. Stat. §216H.03, subd. 3(2). It is undisputed that "new large energy facilities" are providing power through MISO at any given time. (*See* ECF 138, Ex. A at ¶41) Defendants nonetheless argue subdivision 3(2) cannot apply to MISO because "[i]n the MISO energy markets, a buyer is simply purchasing electricity from a

[2] *See* http://www.youtube.com/user/MISOEnergy?feature=bf.

pool of electrons in the transmission system….The buyer does not know the physical source of the electrons purchase….” (ECF 166 at 7) Defendants argue subdivision 3(2) must instead “appl[y] to the [***capacity***] agreement that the Minnesota entity makes outside of the MISO market regarding the relevant power.” (ECF 166 at 8) The statute provides no basis to support Defendants’ limiting construction.[3] MISO controls how ***energy*** and ***power*** actually flow through the interconnected grid—not the owners of the new large energy facility. Thus, §216H.03 applies to MISO’s decisions to dispatch power from new large energy facilities, thereby triggering the statute.

Defendants further argue that power purchases made through MISO are not regulated under Minn. Stat. §216H.03 because in the MISO market “[t]he buyer does not know the physical source of electrons purchased, and therefore the buyer does not ‘import or commit to import’ power from a ‘new large energy facility’ through the MISO energy markets.” (ECF 166 at 7-8) However, there is no “knowledge” requirement in subdivision 3(2). Moreover, the MDOC has already applied §216H.03 to Dairyland—which obtains its wholesale power for its Minnesota members through MISO—and Basin, even though neither of these entities is “knowingly” importing energy into Minnesota from new large energy facilities.

III. PRIOR PROCEEDINGS BEFORE THE MPUC

Prior proceedings before the MPUC illustrate the significant burdens imposed by §216H.03 on out-of-state entities and out-of-state transactions involving out-of-state

[3] Defendants essentially ask the Court to rewrite the statute despite its plain language. Courts cannot do this. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 792 (8th Cir. 1995).

generation sources. These proceedings illustrate how out-of-state entities must come to the MPUC "hat-in-hand" to seek approval of transactions over which the MPUC has no constitutional authority to regulate. These proceedings also demonstrate that subdivision 4's requirements to establish offsets to the MPUC's "satisfaction" are entirely (and seemingly intentionally) impractical obstacles that merely perpetuate the statutory prohibitions by interfering with Basin's, Minnkota's, and MRES's ability to plan and administer their region-wide resource portfolios.

A. GRE

The GRE docket illustrates the onerous challenges imposed by subdivision 4's requirements that project proponents "demonstrate to the [MPUC's] satisfaction" they will offset emissions, and that these offsets must be "permanent, quantifiable, verifiable, enforceable, and would not have otherwise occurred." (ECF 137, at 14-16) GRE's efforts to "satisfy" the MPUC for its Spiritwood Station spanned nearly three years—and would have continued had GRE not obtained a statutory exemption. It is simply not practical for utilities like Basin, Minnkota, and MRES to provisionally engage in wholesale transactions subject to seeking approval in protracted proceedings before the MPUC with uncertain outcomes. (ECF 174, ¶¶14-15; ECF 175, ¶¶19-20; ECF 176, ¶¶19-20)

B. Dairyland

Defendants now seek to distance themselves from the MDOC's positions in the Dairyland docket by selectively quoting MDOC's pro forma assertion that it was "not reach[ing] a conclusion as to whether and how Minn. Stat. §216H.03 applies to

Weston 4." (ECF 166 at 16-17) A review of the MDOC's complete submission in Dairyland demonstrates how §216H.03 applies to Dairyland's Weston 4 facility—even though the Weston 4 facility is located in Wisconsin, the entirety of Weston 4's output went through the MISO market, and Dairyland had no intention Weston 4 would ever be used to serve its Minnesota members. (ECF 137 at 16-18; ECF 171 at 11-12)

C. Basin

Basin notified the MPUC that it was transferring power from its Dry Fork facility to serve North Dakota load. (ECF 137 at 18-20) Basin did so to eliminate the threat of adverse action by Defendants under §216H.03. However, two years have passed since Basin first raised this issue with the MPUC and MDOC, and the threat remains. In the meantime, Basin's region-wide resource planning is hindered by the prospect that Basin's use of its Dry Fork facility, or power from any other new large energy facility, will be deemed to violate §216H.03. (ECF 140, ¶¶19-26; ECF 141, ¶11-13; ECF 176, ¶¶16-20)

ARGUMENT

I. MINN. STAT. §216H.03 VIOLATES THE COMMERCE CLAUSE.

A. Minn. Stat. §216H.03 Is An Impermissible Extraterritorial Regulation

State laws that attempt to "control conduct beyond the boundary of the state" are invalid. (*Healy v. The Beer Inst.,* 491 U.S. 324, 336-337(1989)("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."); *See also C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 393 (1994)("States and localities may not attach restrictions to exports or imports in order to control commerce in other states.").

Plaintiffs previously established that Minn. Stat. §216H.03 is an unlawful extraterritorial regulation. (ECF 137 at 24-29; ECF 171 at 22-28) Rather than addressing the extraterritorial effects of the statute, Defendants and the Environmental Groups argue the extraterritoriality doctrine does not apply because §216H.03 is not a price control statute. (ECF 171 at 24-26)

Defendants and Environmental Groups rely on *Pharmaceutical Research Manufacturers of America v. Walsh*, 538 U.S. 644, 669 (2003), for the proposition that the extraterritoriality doctrine only applies to price control laws. This characterization of the holding is plainly incorrect, as the Supreme Court itself has applied the doctrine to other types of regulations. *See C&A Carbone*, 511 U.S. at 393 (*citing Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935)(striking down waste flow control ordinance)); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)(striking down Illinois blue-sky law on extraterritoriality grounds)(plurality opinion). The Supreme Court also recently denied certiorari in *American Beverage Ass'n v. Snyder*, 700 F.3d 796 (6th Cir. 2012), *cert. denied*, 2013 WL 1935301 (S.Ct. Oct. 7, 2013), which applied the extraterritoriality doctrine beyond the price-affirmation context. (*See also* ECF 171 at 24-27)[4]

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[4] Plaintiffs previously mistakenly described the Supreme Court as having struck down a statute in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The Court did not strike down a statute, but instead vacated a punitive damages award that had applied Alabama common law. In doing so, the Court cited two bedrock extraterritorial dormant commerce clause cases—*Healy* and *Edgar*. *Id.* at 571-72. Thus, although *BMW* did not involve a statute, it certainly supports the proposition that state law may not regulate conduct occurring beyond its borders.

Defendants rely on *Alliant Energy Corp. v. Bie,* 336 F.3d 545, 549 (7th Cir. 2003), to argue that states may validly regulate internal matters even if the regulation has incidental external effects. (ECF 166 at 26-27) However, *Bie* acknowledges that direct regulations on extraterritorial commerce are *per se* invalid. 336 F.3d at 547 (noting the "unsurprising principle that a *direct or facial* regulation of wholly extraterritorial transaction is *per se* invalid")(emphasis original). In contrast to the incidental and unintended extraterritorial effects of the statute in *Bie,* §216H.03 directly and intentionally affects transactions that occur outside its borders, and effectively regulates the planning and administration of resources portfolios throughout the integrated interstate region. (*See* Blumsack Dep. at 127:1-7, 128:14-19, 128:21-29:4, Second Suppl. Boyd Decl. Ex. CC; ECF 174, ¶¶10-12; ECF 175, ¶¶13-16; ECF 176, ¶¶13-16))

Basin provides a perfect example. To fulfill its obligations to its members in northwestern North Dakota, Basin has transferred energy from its "new large energy facility" in Dry Forks, Wyoming, to the Eastern Interconnection in South Dakota for consumption in North Dakota. The MDOC interpreted §216H.03 to apply to this entirely extraterritorial transaction because Basin has Minnesota members.

Dairyland provides another example. Dairyland, a Wisconsin-based generation and transmission cooperative with only three Minnesota members, acquired a 30% ownership interest in the Weston 4 facility (a "new large energy facility") in Wisconsin which was constructed pursuant to a certificate of need authorized by the Wisconsin Public Service Commission. It is undisputed that Dairyland sells all of its output from Weston 4 into the MISO market and buys whatever it needs out of the MISO market.

Despite this, the MDOC interpreted §216H.03 to apply to Dairyland's ownership of Weston 4 by virtue of Dairyland's sales and purchases in the MISO market and the fact that Dairyland has Minnesota members.

Defendants now insinuate that §216H.03 does not regulate Dairyland or Basin, but instead merely regulates their Minnesota members' reliance on certain types of generation. Of course, this is a complete fallacy. Minn. Stat. §216H.03 does not limit its application solely to Minnesota distribution utilities—it states "no person shall." Moreover, Defendants' current contention is also belied by the fact that the MDOC has already asserted §216H.03 applies to Dairyland and Basin. Minnesota's authority over retail activities of in-state entities does not give it the constitutional authority to regulate upstream commerce, such as transactions occurring completely outside of Minnesota involving entities organized and operating outside Minnesota.

Defendants attempt to distinguish *National Solid Waste Management Ass'n v. Meyer*, 165 F.3d 1151 (7th Cir. 1999), and 63 F.3d 652 (7th Cir. 1995), arguing that "the statute required the processing of *all* waste in an out-of-state community to be in accordance with Wisconsin's performance, including waste that was disposed of outside of Wisconsin," whereas §216H.03 only "concerns electricity that is to be consumed in Minnesota." (ECF 166 at 26 (emphasis original)) Defendants are simply ignoring what §216H.03 plainly says, as well as the Basin and Dairyland dockets in which the MDOC demonstrated that §216H.03 applies even where the power is not actually "consumed" in Minnesota.

Moreover, §216H.03's regulation based on "consumption" of electricity—a uniquely untraceable commodity—is fraught with extraterritorial problems. Since one can never know what generation-type of electricity is actually being consumed within Minnesota, Defendants have created the fiction of assigning a *pro rata* share of an out-of-state utility's capacity resources to its Minnesota load—even when electricity from those resources is not intended to be consumed in Minnesota and even though there is no evidence that any electricity from those resources has actually been consumed in Minnesota. The end result is that ***every*** transaction entered into by multi-state entities with Minnesota members (like Basin or Dairyland) is regulated under §216H.03.

Minn. Stat. §216H.03's application based on where the "power" is consumed—which in turn allows Minnesota to regulate based on where the "capacity" might be consumed if and when it generates power—makes it impossible for a multi-state operator to use the prohibited types of generation to satisfy the wholesale power obligations it owes to its members. Unlike lamps or garbage or ethanol, electricity goes where it flows on the grid and cannot be effectively traced from the point of generation to the point of consumption. Interstate electrical cooperatives cannot exclusively provide Minnesota-approved energy to Minnesota and send all other energy elsewhere.

Perhaps the most dispositive indicator of whether a state regulation is invalid is whether a party can avoid a violation of the statute if it wishes to engage in state-regulated conduct that does not occur in the regulating state. *Compare, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987)(Indiana antitakeover statute regulated only entities incorporated in Indiana); *Rocky Mountain Farmers' Union v.*

Corey, 2013 WL 5227091 (9th Cir. Sept. 18, 2013)(ethanol producers could avoid California regulations by refusing to sell ethanol in California); *with Edgar v. MITE Corp.*, 457 U.S. 624 (1982)(Illinois antitakeover statute impermissibly regulated transactions for entities other than those created under Illinois law); *Graham v. Sotheby's Inc.,* 860 F.Supp.2d 1117 (C.D. Cal. 2012)(California statute impermissibly applied to conduct that occurred outside California's borders). Thus, a state regulation with extraterritorial effects may be permissible if a party has a practical way to avoid the regulation when it conducts commerce outside of the state. However, where parties have no practical means to avoid the state regulation at issue when engaging in commerce wholly outside the state, those regulations have been struck down because they unconstitutionally regulate extraterritorially. *See Am. Bookseller's Found. v. Dean,* 342 F.3d 96, 102-04 (2d Cir. 2003); *Se. Booksellers Ass'n v. McMaster,* 371 F.Supp.2d 773, 787 (D.S.C. 2005); *Am. Libraries Ass'n v. Pataki,* 969 F.Supp. 160, 173-77 (S.D.N.Y. 1997). Minn. Stat. §216H.03 is unconstitutional because, as a practical matter, parties such as Basin, Minnkota, and MRES are forced to abide by Minnesota's regulation even when selling electricity to South Dakota or Iowa, or providing wholesale power to their North Dakota members. This is because there is simply no certain, predictable, and reliable way to segregate electricity that will be "consumed" in Minnesota from electricity that will not be "consumed" in Minnesota.

B. Minn. Stat. §216H.03 Discriminates Against Out-of-State Entities And Imposes Undue Burdens On Interstate Commerce

Defendants contend that §216H.03 regulates even handedly and does not burden interstate commerce. (ECF 166 at 22-25) However, the plain language of the statute demonstrates otherwise. (*See* ECF 137 at 29-32; ECF 171 at 29-33)

Plaintiffs have pointed to subdivision 3(1), which prohibits the construction of new coal-fired generation facilities within Minnesota, as evidence that the statute regulates evenhandedly. Subdivision 3(1)—as well as subdivision 3(2)—necessarily discriminates against out-of-state coal suppliers because there is no coal in Minnesota. (ECF 138, Ex. U, Resp. to RFA No. 5) Instead, Minnesota is promoting the use of renewable sources such as wind energy which can be developed within its borders while prohibiting generation from coal which Minnesota does not possess. *See Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)("The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."). Minn. Stat. §216H.03 thus clearly discriminates against coal-fueled sources of electricity in a manner which inherently disfavors out-of-state interests without any corresponding adverse effects on Minnesota, since Minnesota does not supply coal.[5]

[5] The 2007 statutory exemptions in §216H.03, subds. 5-7 reinforce that the statute does not apply evenhandedly. Plaintiffs are not arguing that the exemptions themselves are unconstitutional, nor are Plaintiffs asking the Court to strike down these exemptions. But these exemptions are further evidence of the statute's discriminatory intent and affects.

Minn. Stat. §216H.03 also imposes burdens on existing out-of-state generators without similarly burdening existing in-state generators. Subdivision 3(3) states that "no person shall…enter into a new long-term power purchase agreement ***that would increase*** statewide power sector carbon dioxide emissions. (Emphasis added.) "Statewide power sector carbon dioxide emissions" are defined as "the total annual emissions of carbon dioxide from the generation of electricity within the state ***and*** all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota." Minn. Stat. §216H.03, subd. 2 (emphasis added). Thus, new long-term power purchase agreements with existing carbon-emitting facilities located in Minnesota are not prohibited because they will not ***increase*** statewide power sector carbon dioxide emissions; the emissions associated with such an existing in-state facility would already be part of the "total annual emissions of carbon dioxide from the generation of electricity within the state." The same assumption cannot be made with respect to a long term power purchase agreement with a carbon-emitting facility located outside Minnesota, which may well be deemed to ***increase*** emissions associated with power "consumed in Minnesota." Thus, proponents of new long-term power purchase agreements associated with out-of-state generation sources are burdened with the uncertainty and costs of complying with subdivision 4, whereas the proponents of new long-term power purchase agreements with existing generation facilities located in Minnesota are not.

C. The Statute Does Not Advance Any Legitimate Local Interest

Defendants claim that §216H.03 was passed by the legislature to "promote a stable future supply of reliable, affordable energy and to promote clean energy as a means of furthering environmental and public health interests." (ECF 166 at 22) Notably, however, these objectives are not set forth anywhere in the statute itself. Additionally, it is illogical to suggest that removing or burdening the most reliable and affordable source of energy—coal-generated energy—would "promote a stable future supply of reliable, affordable energy." The statute, by definition, promotes less diversification and favors higher cost and less reliable generation sources. Moreover, to the extent reliable and affordable energy were the legislative goals, federal mechanisms already exist to achieve these goals. Indeed, reliable and affordable energy is one of the primary purposes of MISO, and the MISO market is operated to maximize reliability and lower costs in the energy supply.

Defendants also argue §216H.03 is necessary to prepare Minnesota for impending federal regulations on carbon dioxide. Again, it is simply illogical to claim that imposing additional costs on top of the costs that are expected to be imposed by federal regulations will promote resource reliability and lower consumer costs. If coal becomes more expensive and less reliable due to federal regulations, the MISO market will address those increased costs and optimize the resource mix through its focus on lowest cost alternatives and reliability. Simply stated, §216H.03 does not and cannot achieve—and is not necessary to achieve—the objectives that Defendants now impute to the statute.

II. THE STATUTE VIOLATES THE SUPREMACY CLAUSE

A. The Federal Power Act Preempts §216H.03.

Plaintiffs previously established that the federal government has exclusive jurisdiction over transmission of electric energy in interstate commerce and the sale of such energy at wholesale. (ECF 137 at 36-37; ECF 171 at 37-38) Minn. Stat. §216H.03 invades this exclusive authority by prohibiting certain wholesale transactions, and imposing terms and conditions on those wholesale transactions in the form of "offset" obligations—effectively an import tax—that necessarily increase the costs of those wholesale transactions. (ECF 137 at 38-39; ECF 171 at 38-40)

Subdivision 3(2) plainly invades the federal government's exclusive jurisdiction over energy transmission in interstate commerce. Defendants acknowledge that "transmission" is the "delivery of electricity from the generation facility to the local distribution system." (ECF 166 at 28) Defendants cannot plausibly claim that a prohibition of certain electricity "imports"—which can only occur through "transmission" on the regional system—is not a regulation of transmission.

Subdivision 3(3) regulates wholesale agreements and invades the federal government's exclusive jurisdiction over "the sale of energy at wholesale" and "agreements that affect wholesale rates." *See Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964)("*FPC*"); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). Minn. Stat. §216H.03 does not fit into the states' traditional and limited authority to regulate generation sources located within a state or the "sale at local retail rates to ultimate consumers." *See FPC*, 376 U.S. at 214.

Defendants claim the FPA "regulat[es] only sellers of wholesale power and sellers of transmission service. The FPA does not regulate the purchasers of those services." (*See* ECF 166 at 28) However, there is no federal case law to support the proposition that state authority to regulate rates paid by ratepayers permits broader state regulation over "wholesale purchasers." Federal jurisdiction is based on the transaction, and therefore federal authority covers both sellers and buyers in those transactions. *See Miss. Power & Light Co. v. Miss. ex rel. Moore,* 487 U.S. 354, 374 (1988)(federal jurisdiction extends to "agreements that affect wholesale rates"). *See also Nw. Century Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 518 (1989)(noting that a state statute that regulated interstate pipeline "purchasing practices and pricing" would be preempted).

Defendants rely on *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 837 F.2d 600, 609 (3d Cir. 1988)("*KWV*"), to support the proposition that "states can regulate purchases without entering into FERC's exclusive domain, because the state and FERC are doing different things." (ECF 166 at 29-30) Defendants' characterization of *KWV* is overbroad and incorrect. The statute in *KWV* precluded local intrastate distribution companies from "passing-through" the costs of certain purchases onto their retail customers if lower-cost sources were available. 837 F.2d at 609. The Court held that such a regulation fell within the "states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates." *Id.* Thus, the statute at issue in *KWV* survived because it was directly related to retail rate-setting, not because it regulated wholesale "purchases" as opposed to "sales."[6] *Id.* at 604-05.

Minn. Stat. §216H.03 is not a retail rate-setting statute regulating what costs can or cannot be "passed-through" by intrastate distribution utilities to their customers in retail rates. Rather, §216H.03 directly applies to and regulates the terms and conditions of interstate wholesale transactions by either prohibiting those transactions entirely, or imposing offset requirements as additional terms and added costs of those transactions. Moreover, §216H.03 does not merely apply to local intrastate distribution utilities; the plain language of the statute and the interpretations by the MDOC apply to interstate wholesale generation and transmission utilities like Basin, MRES, and Minnkota.

The United States District Court for the District of Maryland recently struck down a state directive that, like the NGEA, directly regulated wholesale energy and capacity transactions. *See PPL Energyplus, LLC v. Nazarian*, 2013 WL 5432346 (D.Md. Sept. 30, 2013).[7] There, the Maryland Public Service Commission issued a Generation Order that was effectively the mirror-image of §216H.03—rather than prohibiting or effectively taxing transactions with certain types of generation facilities, it required certain Maryland utilities to enter into contracts with one particular generation facility. *See id.* at *25. In considering whether the Generation Order was preempted by the FPA, the court stated: "The Court does not perceive, for purposes of field preemption, any meaningful difference between state actions directed to the demand side and those directed to the supply side of the wholesale energy market." *Id.* at *33. The court held the Generation

[6] The Third Circuit warned against improper expansion of its holding: "We caution, however, that our rationale concerning the PUC's [retail] rate-setting authority should not be construed as a finding that its regulatory jurisdiction is without limitation." *Id.* at 609.

[7] The *PPL* opinion has a detailed background section summarizing power grids, the development of wholesale energy markets, and the functions and operations of PJM Interconnected, LLC ("PJM"). *See* 2013 WL 5432346, at *2-17. PJM is the RTO responsible for all or part of 13 states and the District of Columbia. PJM essentially serves the same function for these states as MISO serves for the midcontinent states, and PJM operates generally in the same way.

Order was preempted under the FPA due to field preemption. *Id.* at *41-42. Among other things, the court noted that states have no authority to interfere in the terms and conditions of wholesale energy and capacity sales by setting rates for such sales because wholesale energy and capacity sales are exclusively subject to the regulation of FERC. *Id.*

Minn. Stat. §216H.03 is even more egregious than the Generation Order in *PPL* because it does not merely set the rate for wholesale energy and capacity transactions, it actually prohibits certain transactions in their entirety. The only way to avoid this prohibition is to pay a *de facto* tax in the form of "offsets" that must be demonstrated to the satisfaction of the MPUC. States have no authority—traditional or otherwise—to regulate wholesale energy and capacity sales in such a manner.

B. The Clean Air Act Preempts the NGEA

The Supreme Court has unqualifiedly declared that "Congress has delegated to the EPA the decision of whether and how to regulate carbon dioxide emissions from power plants." *Am. Elec. Power Co. v. Connecticut*, 131 S.Ct. 2527, 2531 (2011). And, as both sides have previously noted, the federal government is currently promulgating regulations on carbon dioxide emissions associated with power plants. There is no place for individual states to separately regulate carbon dioxide emissions outside the CAA's statutory and regulatory regime.

Furthermore, there is absolutely no authority for states to regulate carbon dioxide emissions occurring in other states. Courts have uniformly rejected efforts to regulate emissions occurring in neighboring states through mechanisms other than the CAA. *See*

N.C. ex rel. Cooper v. Tenn. Valley Auth., 615 F.3d 291, 303 (4th Cir. 2010); *Clean Air Markets v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003). *Cf. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987)(Clean Water Act).

The recent Supreme Court decision in *American Electric Power v. Connecticut* holding that a federal common law nuisance claim was "displaced" by the CAA compels preemption of §216H.03. There, the Supreme Court detailed exactly how the EPA was regulating carbon dioxide emissions from power plants and the recourse available to parties unsatisfied with the EPA's rulemaking. 131 S.Ct. at 2538-39. While *American Electric Power* involved "displacement" of federal common law, as opposed to preemption of a state statute, the analysis and the result should be the same in the instant case. Indeed, the basis for the Court's holding was its conclusion that Congress has "occupied the field" of regulating carbon-dioxide emissions through the CAA. *Id*. Thus, §216H.03 is preempted because it attempts to regulate in a field that Congress has determined should be occupied by the federal government. If Minnesota is "dissatisfied with the outcome of EPA's forthcoming rulemaking, [its] recourse under federal law is to seek Court of Appeals review, and, ultimately, to petition for certiorari in [the Supreme Court.]" *Id.* at 2539.

To avoid the preemptive effect of the CAA, Defendants contend that Minn. Stat. §216H.03 does not regulate out-of-state emissions. (ECF 166 at 31) But it is impossible to reconcile Defendants' contention with the plain language of the statute which applies to "emissions of carbon dioxide from the generation of electricity imported from outside the state." Minn. Stat. §216H.03, subd. 2. Indeed, this Court has already recognized that §216H.03 regulates out-of-state emissions. (ECF 32 at 30 n.10)

Defendants further contend that §216H.03 "does not impose any requirement upon operators of coal-fired power plants to monitor, reduce, or control emissions…." (ECF 166 at 31) This is also not true. By imposing prohibitions on activities that increase or contribute to "statewide power sector carbon dioxide emissions"—which is defined to include "emissions of carbon dioxide from the generation of electricity imported from outside the state"—and then requiring offsets for these contributions or increases that are "permanent, quantifiable, verifiable, enforceable, and would not have otherwise occurred," the statute is necessarily requiring out-of-state generators to monitor, reduce, and control emissions. A "project proponent" can only offset emissions if those emissions are monitored, reduced, and/or controlled by the out-of-state generator. Thus, §216H.03 plainly regulates out-of-state emissions and is preempted by the CAA.

CONCLUSION

Based on the foregoing, as well as those reasons previously stated (ECF 137&171), Plaintiffs request their Motion for Summary Judgment be granted in all respects.

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