CLIENT ALERT

Eighth Circuit Invalidates Minnesota's Climate Change Law

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Last week, in *North Dakota v. Heydinger*, No. 14-2156, (8th Cir. June 15, 2016), the U.S. Court of Appeals for the Eighth Circuit, affirming a lower court decision, struck down a Minnesota state law limiting the carbon intensity of the state's utility grid by proscribing out-of-state imports or long-term power contracts with "new large energy facilit[ies] that would [increase] statewide power sector carbon dioxide emissions." The decision comes at a time when EPA's Clean Power Plan to reduce CO2 emissions from the power sector is on hold pending judicial review, leaving the states essentially on their own with regard to greenhouse gas (GHG) reductions initiatives. The *Heydinger* decision potentially raises several questions on the constitutional viability and design of state GHG mitigation programs affecting the electric energy sector.

In 2007, Minnesota enacted the Next Generation Energy Act ("the Minnesota Law"). The law prohibited Minnesota utilities from generating or purchasing energy from "new" power sources greater than 50 MW if those sources would increase state-wide carbon emissions above a designated baseline, unless those emissions were offset by verifiable CO2 emission reductions. In other words, the prohibition was not absolute; Minnesota utilities could continue to purchase from new, out-of-state fossil fuel plants, so long as the CO2 emissions associated with those purchases were offset with CO2 credits.

The Minnesota Law applied directly only to regulated Minnesota utilities. However, because the Minnesota Law also addressed purchases by those utilities from non-Minnesota generators, several plaintiffs challenged the regulation as preempted by the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution. In April 2014, a Minnesota federal district court struck down the Minnesota Law, holding the act *per se* invalid because it violated the "extraterritorial doctrine" of the dormant Commerce Clause, which prohibits state laws that have the "practical effect of controlling conduct beyond the boundaries of the state." *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 910 (D. Minn. 2014). The district court concluded that the Minnesota Law "controlled the conduct" of non-Minnesota generators by physically preventing their electricity from entering Minnesota.

Last week's Eighth Circuit decision affirmed the lower court decision, with each Judge holding the Minnesota Law unconstitutional, but on differing grounds. Judge Loken's opinion concluded that the Minnesota Law impermissibly regulated the actions of out-of-state generators in violation of the dormant Commerce Clause. Judge Loken noted that non-Minnesota generators sell energy into the regional wholesale market operated by the Midcontinent Independent System Operator (MISO), which includes Minnesota and other states, with no specific contractual destination point, thereby exposing those generators to liability under the Minnesota Law. Judge Loken did not explain what that liability might be since there is no compliance obligation or effect on those sales, nor did he appear to distinguish between laws that regulate sales of electricity from laws that regulate GHG emissions.

The other two opinions, by Judges Murphy and Colloton, also held the Minnesota Law unconstitutional, but on grounds of federal preemption (citing the Federal Power Act (FPA) and the Clean Air Act, respectively). Judge Murphy held the Minnesota Law to be preempted under the FPA, which gives the Federal Energy Regulatory Commission exclusive jurisdiction over the wholesale sale and transmission of electricity in interstate commerce. Judge Colloton, on the other hand, pointed out that the

Minnesota Law does not in fact prohibit the importation of wholesale electricity, since the law permits utilities to engage in such transactions if emission offsets are procured. Nevertheless, Judge Colloton was troubled that the Minnesota Law interfered with the "cooperative federalism" framework of the Clean Air Act, whereby EPA has the authority to establish federal standards, with the states then adopting individual State Implementation Plans. Judge Colloton reasoned the Minnesota Law "encroach[es] on the source State's authority to govern emissions from sources within its borders," and stated that if "other States in the region enacted laws similar to the Minnesota statute, then an energy facility could be required to comply with multiple varying emissions requirements in order to sell wholesale energy through the MISO market." This analysis of the Minnesota Law, if applied to other greenhouse gas reduction programs, could be a basis for challenging regimes like that of California, which also approaches CO2 compliance by regulating the power purchases of its local utilities.

The *Heydinger* decision thus could have practical significance for the many states pursuing climate policies that include regulating the retail market and the power purchasing decisions of their local utilities, whether under the Clean Power Plan (if ultimately approved by the courts) or state GHG emission regulations establishing carbon trading platforms or portfolio requirements. At a minimum, states seeking to develop such policies will need to account for and design market-based GHG programs in a manner that addresses extraterritorial impact and federal preemption challenges. Moreover, *Heydinger* is one of a growing number of cases testing the increasingly strained dividing lines between federal and state authority, and could well join the ranks of the many other cases that have reached the federal appellate and U.S. Supreme Court.

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