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Utilities Back 8th Circ. Push Against Minn. Emissions Law

By **Lance Duroni**

Law360, Chicago (February 04, 2015, 4:38 PM ET) -- A trio of groups representing public utilities on Tuesday joined the industry chorus urging the Eighth Circuit to continue blocking enforcement of a Minnesota emissions law that effectively barred the use of electricity from new coal-fired power plants, saying the law encroaches on business in neighboring states.

The American Public Power Association, the National Rural Electric Cooperative Association and the Missouri Joint Municipal Electric Utility Commission argued in an amici brief that Minnesota's Next Generation Energy Act improperly extends the state's regulatory reach beyond its own borders, running afoul of the dormant Commerce Clause.

Passed by the state legislature in 2007, the act says that any new power sources that produce or supply 50 or more megawatts and increase carbon dioxide emissions — with limited exceptions — are barred from being added to Minnesota's energy mix, unless those emissions are offset by reductions elsewhere. In April, a Minnesota federal judge ruled the law **unconstitutionally restricts** interstate commerce.

In appealing that decision to the Eight Circuit, Minnesota argues the NGEA is a valid exercise of traditional state authority to regulate the provision of electricity to Minnesota customers.

However, in Tuesday's brief, the utility groups said that reversing the lower court could open the floodgates for conflicting regulations from various states affecting the same power plants, undermining regional power markets and forcing utilities to pass the increased costs onto consumers.

The "increasingly interconnected" nature of today's power markets makes defending against such cross-border regulation imperative, they added.

Moreover, while the law's intent is to combat climate change, the groups stressed that their objection isn't solely focused on coal-fired power plants, noting that the NGEA could impact renewable sources like power stations that run on landfill gas, sewage and mixed municipal waste. In fact, they posited that the law could end up hampering renewable energy initiatives.

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

The utility groups also accused Minnesota of altering its reading of the law on appeal in an effort to soften its unconstitutional restrictions on interstate commerce. This “strained interpretation” purports that the law only applies to Minnesota utilities and contracts to import electricity in the future, they said.

But the groups countered that the law clearly and unambiguously cuts a much wider path. And, in any event, the state’s “saving construction” doesn’t resolve the “practical problems” that the law imposes on the utilities that make up their membership, according to the brief.

“Those members must make investment and pricing decisions that inevitably rest on premises about whether the NGEA means what it says,” the brief said. “A tactical concession in a brief is an insecure basis upon which to borrow millions for generation facilities, propose rates for customers or commit to the kinds of long-term contracts and commercial relationships to which [NGEA] facially applies.”

The groups’ brief largely echoed arguments made by other business advocacy groups — the U.S. and Minnesota Chambers of Commerce, the American Fuel and Petrochemical Manufacturers Association, and the National Association of Manufacturers — in **a separate amici brief** filed Monday.

APPA and NREC are represented by John M. Baker, Erin Sindberg Porter and Karl C. Procaccini of Greene Espel PLLP.

MJMEUC is represented by Douglas L. Healy of Healy Law Offices LLC.

The case is State of North Dakota et al. v. Beverly Heydinger et al., number 14-2156, in the U.S. Court of Appeals for the Eighth Circuit.

--Additional reporting by Daniel Wilson and Juan Carlos Rodriguez. Editing by Philip Shea.

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