



*STATE OF NORTH DAKOTA ET. AL.*

*v.*

*HEYDINGER, CHAIR OF MINNESOTA  
PUBLIC UTILITIES COMMISSION*

**CASE NOTE**

Prepared for the

State-Federal RPS Collaborative

by

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April 2014

## **About This Case Note**

This case note and the State-Federal RPS Collaborative are generously supported by the U.S. Department of Energy and the Energy Foundation. However, the views and opinions stated in this document are the author's alone.

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## CASE NOTE:

***State of North Dakota et. al. v.  
Heydinger, Chair of Minnesota Public Utilities Commission***  
**Case No. 11-cv-3232**

(Issued April 18, 2014)

On April 18, 2014, a Minnesota federal district court issued a decision in *State of North Dakota et. al., v. Heydinger, Chair of the Minnesota Public Utilities Commission*, holding that Minnesota’s Next Generation Energy Act (Minnesota law or Act), a law that aimed to reduce in-state carbon dioxide emissions from new energy facilities, violated the Commerce Clause by reaching beyond the state’s borders to regulate activity in neighboring states, thereby interfering with free flow of interstate commerce. As discussed below, the Minnesota court’s ruling is not expected to impact most state RPS requirements which generally apply only to power suppliers located or selling power within the state—and not to activities conducted entirely outside of state borders.

*Heydinger* involved a challenge to Minnesota’s Next Generation Energy Act by North Dakota, a state that produces a large portion of its generation from coal-fired plants, along with several cooperatives located outside of Minnesota that serve member utilities in Minnesota and surrounding states. The Minnesota Act prohibits any person—either within or outside of Minnesota—from:

1. Constructing a new energy plant in the state that would contribute to statewide CO<sub>2</sub> emissions;
2. Importing power into Minnesota from outside the state from a new energy facility that would contribute to statewide CO<sub>2</sub> emissions or
3. Entering into certain long-term power-purchase agreements that would increase statewide CO<sub>2</sub> emissions—unless the company could demonstrate to the Minnesota PUC that it offset emissions elsewhere.

The Act defines “statewide CO<sub>2</sub> emissions 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.”

North Dakota and its allies argued that the Act’s prohibition on imports and power purchase agreements contributing to statewide emissions, as applied to out-of-state entities, impermissibly encroached on conduct taking place entirely outside of Minnesota borders and thus, interfered with interstate commerce. In response, Minnesota contended that the Act did not violate the Commerce Clause because (1) it prohibited both in-state and out-of-state companies from purchasing power that would contribute to emissions within the state and (2) did not directly control commerce entirely outside of the state, but only to the extent that the activity impacted Minnesota.

The Commerce Clause prohibits states from interfering with or unduly burdening interstate commerce. One way that states interfere with interstate commerce that has been discussed in the context of RPS is through discriminatory treatment—for example, limiting RPS eligibility to in-state renewable generators and excluding those located outside the state. This type of practice interferes with commerce by giving in-state renewables a competitive advantage and discouraging sales of renewable generation from out-of-state.

However, there is a second form of interference with interstate commerce, less relevant to RPS programs, known as the “extra-territoriality doctrine.” Under the extraterritoriality doctrine, the Commerce Clause precludes states from regulating conduct that takes place wholly outside of the state’s borders—because if all states were to adopt conflicting, extraterritorial legislation, the free flow of commerce across borders would be disrupted.

The court invalidated the Minnesota Act under the Commerce Clause. The court held that Minnesota’s law was a “classic example of [impermissible] extraterritorial regulation” because it applied to transactions occurring wholly outside of Minnesota’s borders—in part due to the regional nature of the utility grid and the fact that electrons follow the laws of physics and do not adhere to state boundaries. Under the court’s view of the Minnesota Act, when a North Dakota utility sells power from an emissions-contributing source to a North Dakota customer via a regional grid, some of the electricity might be diverted into Minnesota, thereby violating Minnesota’s import restrictions. As a result, the Minnesota Act has the effect of impermissibly controlling conduct outside its borders—since entities (like the North Dakota utility) located outside of Minnesota and attempting to engage in commerce with other non-Minnesota entities must nevertheless, comply with Minnesota law or risk legal action.

The court also declared unconstitutional the provisions of the Minnesota Act allowing an out-of-state company to enter into an emissions-increasing PPA upon demonstrating to the Minnesota PUC that it had offset emissions elsewhere. The court held that this provision also overreached by subjecting non-Minnesota entities to Minnesota regulatory authority in order to engage in activity outside of the state.

There are several ways that Minnesota could limit the scope of its statute to achieve the goal of reducing emissions in a constitutionally compliant matter. For example, Minnesota

could prohibit in-state utilities from entering into PPAs with or importing power from coal or other emissions-producing generators used to serve Minnesota load. Moreover, Minnesota can continue to ban construction of new in-state plants that contribute to statewide emissions since that provision of the Minnesota Act was not challenged and remains intact.

The Minnesota decision is not likely to impact most state RPS programs. Whereas the Minnesota law regulated activity outside the state's borders, state RPS requirements generally apply to suppliers located in the state or that sell power to in-state customers. For that reason, state RPS requirements generally do not have extraterritorial reach. To be sure, RPS laws may "influence" an out-of-state entity's decisions—for example, an out-of-state renewable generator is more likely to sell power in states with favorable RPS programs rather than those that do not offer renewable energy certificates (RECs). However, state policies (like RPS programs) that influence an out-of-state generator's decisions are different from and less intrusive than the Minnesota Act, which did not merely influence out-of-state generators' conduct but also controlled that conduct by reaching over state lines to subject out-of-state transactions to Minnesota law.

Minnesota Governor Mark Dayton has stated that the state will appeal the federal court's ruling.<sup>1</sup> Thus, the long-term effect of the ruling on state RPS programs and other clean energy initiatives remains to be seen.

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<sup>1</sup> See *Star Tribune*, (April 18, 2014), online <http://www.startribune.com/business/255798461.html>.

## About the Author

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## About the State-Federal RPS Collaborative

The State-Federal RPS Collaborative, managed by the Clean Energy States Alliance, serves as a forum for the exchange of experiences and lessons learned regarding the implementation of state Renewable Portfolio Standard (RPS) policies. It was established to advance dialogue and cooperation among a broad network of state and federal government officials, renewable energy certificate tracking system administrators, NGO experts, industry representatives, and other stakeholders. It is supported by the U.S. Department of Energy and the Energy Foundation. The Collaborative offers a free monthly newsletter, regular webinars, reports, an annual National Summit on RPS, and opportunities for information exchange.

For more information see <http://www.cleanenergystates.org/projects/state-federal-rps-collaborative/>.



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