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## In Test For EPA Rule, Minnesota Seeks To Reinstate Clean Energy Law

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Minnesota officials are strongly urging a federal appeals court to overturn a lower court ruling that rejected a state renewable energy law on constitutional grounds — a case that could determine whether other states will be able to use similar programs to comply with EPA's proposed rule to cut greenhouse gas (GHG) emissions from the power sector.

In a [March 16 final reply brief](#), Minnesota officials argued that North Dakota and other respondents in the case, *North Dakota, et al., v. Beverly Heydinger, et al.*, lack standing to challenge the state's law, the 2007 Next Generation Energy Act (NGEA), because they have suffered no injury as a result of the law's prohibition on construction of new coal plants in Minnesota and importation of power that would contribute to statewide emissions.

North Dakota and several generators that sell power to Minnesota successfully argued to a lower court that the NGEA violated the dormant Commerce Clause because it imposed Minnesota rules on out-of-state utilities.

When the U.S. Court of Appeals for the 8th Circuit decides the issue, it may set a precedent on the constitutionality of renewable electricity requirements, which EPA's existing source performance standards (ESPS) allows states to use as one of the major strategies for attaining their GHG reduction targets.

The Minnesota case is moving more slowly than a similar case challenging Colorado's renewable energy standard (RES) where the 10th Circuit heard oral arguments Jan. 21 in *Energy & Environmental Legal Institute (EELI), et al. v. Joshua Epel, et al.* There, free-market groups are appealing a lower court ruling that upheld the Colorado RES as constitutional, finding the law did not violate the Commerce Clause.

The three-judge panel in the Colorado case [focused almost all of its questions](#) on whether the Colorado RES — which imposes a 30 percent renewable energy requirement on in-state utilities — violates the dormant Commerce Clause by "wholly regulating" utilities outside the state that sell power into Colorado.

EELI argued that the RES unlawfully regulates out-of-state utilities that may export power to Colorado, meaning the "[practical effect](#)" of the state law violates the Constitution.

If EELI succeeds, that could undermine RESs that scores of other states have adopted, and which EPA expects to be used as part of ESPS compliance plans. According to EPA, as many as 29 states and the District of Columbia have enforceable renewable portfolio standards (RPS) or other mandatory renewable capacity policies, while nine states have voluntary goals.

The Minnesota NGEA is not an RPS or an RES, and could ultimately be replaced by a federal requirement such as the ESPS.

Sources have split over whether EPA's inclusion of a renewable requirement in the ESPS could help or hurt state RPS. Some say that federal recognition of a state law would negate any constitutional questions over them, while others have said adverse court rulings could undermine the state programs.

Oral arguments have not yet been set in the Minnesota-North Dakota case, but both that case and the Colorado one are expected to be appealed to the Supreme Court, even though justices last summer declined to review a case that upheld the constitutionality of California's low carbon fuel standard on similar grounds. The prospect of the high court taking one of the renewable energy cases and implicating the ESPS is not being welcomed by renewable energy backers.

**'Preemptive Strike'**

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Minnesota has argued that the 8th Circuit should dismiss North Dakota’s challenge on standing and mootness grounds, or in the alternative to uphold the NGEA until the state utility commission has the opportunity to interpret key provisions.

Minnesota’s final reply brief continues this push, noting that the state has yet to seek to enforce the NGEA and that the litigation over it is a “preemptive strike” that failed to satisfy standing and ripeness requirements.

The reply argues that the NGEA only regulates electricity procured to serve Minnesota, and does not violate the dormant Commerce Clause because it “does not regulate extraterritorially, nor does it discriminate against or unduly burden interstate commerce. . . . Instead [the NGEA] merely regulates in an area of traditional state authority, i.e. the types of generation resources relied on by utilities to serve Minnesota customers. The district erred in finding [portions of the law to be] facially unconstitutional.

Minnesota has support from the [American Wind Energy Association \(AWEA\)](#) and [former electricity regulators](#), along with a coalition of [national environmental groups](#).

North Dakota and its utilities have support from other power companies, the American Coalition for Clean Coal Electricity, the National Mining Association, the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, the Pacific Legal Foundation and the National Federal of Independent Business Small Business Legal Center.



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