Minnesota's Climate Change Laws: Are They Unconstitutional? North Dakota Thinks So

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Minnesota Climate Change Laws

216H.03 – prohibits

(1) new coal plants

(2) importation (even committing to import) of power from outside state, and

(3) long-term PPAs

- if either would contribute to increased statewide power sector CO_2 emissions (i.e., would otherwise require offsets)

North Dakota's Claims

- Filed suit December 2011
- Six claims
  - Violation of the Commerce Clause (Ct. 1)
  - Violation of Supremacy Clause (Cts. 2-3)(CAA and FPA)
  - Privilege and Immunities (Ct. 4)
  - Supremacy Clause again (Ct. 5)
  - Prohibition against special legislation

Minnesota Response

- March 1 - filed for judgment on pleadings for Cts. 2-6
- Stated it would file for SJ on Ct. 1 later

Commerce Clause

- Art. I, § 8, Cl. 3 explicitly grants Congress power to regulate commerce among states
- "Dormant Commerce Clause" – or "negative aspect" – limits states' ability to discriminate/burden interstate commerce

Commerce Clause – Two Tier Approach

- First Tier – *Per Se* Test
  - Where state statute/rule directly regulates or discriminates = *per se* violation
    - e.g., prohibiting importation of solid waste, or exportation of hydropower

Commerce Clause – Two Tier Approach

- Second Tier – where statute/rule has indirect effects but regulates evenhandedly
  - Statute/rule upheld unless burden "clearly excessive" in relation to local benefits
  - So-called "*Pike* balancing test"

Pre-emption

- Supremacy Clause, Art. VI, Cl. 2 – invalidates laws that interfere with, or are contrary to, federal law
  - Where federal regulation sufficiently comprehensive such that Congress "left no room" for supplementary state regulation

Electric Energy a Commodity in Interstate Commerce

- "Since electric energy can be delivered virtually instantaneously when needed [on interconnected grid] at a speed of 186,000 mph [speed of light]" . . . "it is difficult to conceive of a more basic element in interstate commerce."
- *FPC v. Florida Power and Light* (1972); *FERC v. Mississippi* (1982)

Commerce Clause Analysis – First Tier

- Is it economically protectionist?
  - Not likely – imposes same CO_2 restrictions on in-state vs. out-state plants
- Does it *directly* regulate interstate commerce? Likely
  - Applies to "power sector CO_2 emissions" in-state and out-state
  - Designed to avoid "leakage" – i.e., decrease in MN emissions results in increase in emissions elsewhere – legislation must apply to all emissions
  - Given interconnected nature of grid – prohibiting importation of fossil-based electricity likely improper because necessarily directly affects sale in other states
  - Extraterritorial effect - legislation not concerned with electrons entering state; concerned with CO_2 emissions occurring outside its borders
  - MN could not prohibit other state from using coal to produce electricity, even if some of it sold in MN – but end result seems to be the same

Commerce Clause Analysis – Second Tier

- Does 216H.03, subd. 3 fail *Pike* balancing test? Likely
  - Minnesota interest in prohibiting new plants largely (if not entirely) symbolic
    - One plant (e.g., 550 MW coal plant) would increase U.S. energy related CO_2 emissions by 0.07% (seven one-hundredths of one percent; significantly less world-wide)
  - Burden likely significant – prevents construction of interstate transmission lines connected to generation in another state
  - If Minnesota can prohibit transmission because disfavors coal, could Wisconsin prohibit transmission tied to nuclear? What about Iowa banning transmission because disfavors natural gas?
  - Grid could not operate under these circumstances – there are certain aspects of national commerce that by their nature require uniform regulation – *Healy v. Beer Institute*, 491 U.S. 324 (1989) – interstate electric grid likely one

Pre-emption

- Is regulatory cost law (216H.06) pre-empted by federal law?
  - Regulatory cost law part of state IRP process – specifically reserved to state PUCs
- Preempted by CAA? Not likely – Congress not occupied field
- Is prohibition against "importation" pre-empted? Likely
  - FERC has exclusive jurisdiction over need for interstate transmission (*New York v. FERC*, 535 U.S. (2002))
  - Legislation creates blanket prohibition on state approval of new interstate transmission facilities determined by FERC/MISO as needed – impossible to square with FERC control of grid
  - If MN can prohibit interconnection of out of state plant based on its policies, other states could do the same; result in balkanization of grid, in contradiction of FPA to create uniform system

MN's Motion to Dismiss

- 216H.03 regulates generation, not transmission
  - States retain authority over generation