



INDUSTRIAL COMMISSION OF NORTH DAKOTA

Jack Dalrymple
Governor

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November 14, 2013

Mr. Michael Rothman, Commissioner
Minnesota Department of Commerce
85 7th Place East, Ste. 500
St. Paul, MN 55101-2198

Mr. John Linc Stine, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road N.
St. Paul, MN 55155-4194

Re: In the Matter of Establishing an Updated 2013 Estimate of the Costs of Future Carbon Dioxide Regulation on Electricity Generation under Minn. Stat. § 216H.06. Docket No. E999/DI-13-796. Docket No. E999/CI-07-1199

Dear Messrs. Rothman and Stine:

Thank you for this opportunity to comment on the Minnesota Public Utilities Commission's 2013 update of its estimate of the cost of carbon dioxide under Minn. Stat. § 216H.06.

When the Minnesota Public Utilities Commission (Commission) first estimated the carbon dioxide cost, North Dakota requested that the Commission clarify that the estimate would not apply to out-of-state facilities. The Commission denied this request, concluding that its cost estimate of between \$4/ton and \$30/ton for carbon dioxide expected to be emitted in 2012 and thereafter applies "in *all* proceedings to acquire electricity generation resources to serve needs in Minnesota," even when those facilities are located outside of Minnesota. *Order Establishing Estimate of Future Carbon Dioxide Regulation Costs* (Dec. 21, 2007) (emphasis added). In subsequent orders, the Commission updated its estimate of the range of likely costs of carbon dioxide regulation to between \$9/ton and \$34/ton of carbon dioxide emitted. See *Order Establishing 2012 and 2013 Estimate of Future Carbon Dioxide Regulation Costs* (November 2, 2012). Notwithstanding the Commission's 2007 ruling and subsequent orders affirming the ruling, we maintain the cost estimate should not be applied to out-of-state facilities.

First, as North Dakota has continually maintained in this and related proceedings, Minnesota's attempt to regulate resources located outside of its borders is an improper, extraterritorial extension of state regulatory authority into North Dakota. This extraterritorial regulation violates the Commerce Clause and Supremacy Clause of the United States Constitution. Minnesota's unconstitutional actions are the subject of a lawsuit filed by North Dakota challenging portions of Minnesota's Next Generation Energy Act. *State of North Dakota et al., v. Lori Swanson,*

Attorney General of the State of Minnesota, et al., No. 11-cv-03232 (U.S. Dist. Ct., Dist. of Minn., complaint docketed Nov. 2, 2011).

Second, Minnesota's actions raise jurisdictional and conflicts of law issues. Similar issues arose in *Re Quantification of Environmental Costs*, Docket No. E-999/CI-93-583 (Externalities Docket), affirmed on appeal, *Matter of Quantification of Environmental Costs*, 578 N.W.2d 794 (Minn. App. 1998). In its July 7, 1997 final order in that proceeding, the Commission determined that, for practicability and comity reasons, it would not apply its environmental cost values in resource planning to facilities located outside of Minnesota. The Commission should make a similar determination in this update.

Third, electricity generators in North Dakota have different options for responding to any future carbon dioxide regulations than do generators in Minnesota. Our electricity generation facilities are located near areas where carbon dioxide can be injected underground for enhanced oil recovery or long-term storage. North Dakota continues to make advances in the use of this technology. Because North Dakota has different options than does Minnesota, any future costs relating to carbon dioxide regulation will be different for North Dakota facilities than for Minnesota facilities, and it is therefore arbitrary to continue to apply the cost estimate to North Dakota facilities.

Fourth, there is currently a process underway to determine the regulatory response to carbon dioxide that will be adopted at a national level. Right now, the outcome is uncertain. So, estimating future regulatory costs at this time is an attempt to quantify something that is currently unquantifiable.

Contrary to statements in the Commission's December 21, 2007 order, Minn. Stat. § 216H.06 does give the Commission the discretion to decline to regulate electricity imported into Minnesota. Nothing in § 216H.06 requires the Commission to regulate beyond Minnesota's borders or requires that the Commission's cost estimate for out-of-state facilities be the same as those located within the state. In fact, § 216H.06 makes no reference to out-of-state generation. Under the statute the Commission has the discretion to determine whether to apply the cost estimate to electricity generated outside of the state, and under its duty to interpret statutes to avoid unconstitutional results, Minn. Stat. § 645.17(3), the Commission must decline to assert Minnesota's authority within the borders of another state.

We therefore request that you recommend that the Commission update the cost estimate for North Dakota facilities to \$0/ton. The reasons for limiting regulation to facilities within Minnesota's borders have become even more apparent over the last six years, and the Commission's unconstitutional and arbitrary decision to apply its cost estimate to North Dakota facilities should now be rectified.

Sincerely,

North Dakota Industrial Commission


Jack Dalrymple
Governor and Chairman