STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package.	Case Nos. A19-0688 and A19-0704 **REQUEST FOR LEAVE TO PARTICIPATE AS AMICUS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND THE MINNESOTA RURAL ELECTRIC ASSOCIATION**

TO: The Supreme Court of the State of Minnesota and to all counsel of record:

The National Rural Electric Cooperative Association ("NRECA") and the Minnesota Rural Electric Association ("MREA") respectfully request leave to participate in this case as amici curiae under Rule 129, and that, under Rule 117, subd. 2(a), (b), and (d)(2), the Court grant review of *In re Minnesota Power's Petition for Approval of EnergyForward Resource Package* ("*EnergyForward*"), Nos. A19-0688, A19-0704, 2019 WL 7042812 (Minn. App. Dec. 23, 2019) (awaiting publication), which reversed a decision of the Minnesota Public Utilities Commission ("MPUC").

I. STATEMENT OF APPLICANTS' INTEREST

Amici's interest is both public and private. NRECA is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. MREA is its local affiliate. America's electric cooperatives are owned by the people whom they serve and comprise a unique sector of the electric industry. From growing regions to remote farming communities, electric cooperatives power

1 in 8 Americans and serve as engines of economic development for 42 million Americans. Collectively, rural electric cooperatives ("RECs") own and maintain 2.6 million miles, or 42 percent, of the nation's electric distribution lines. In addition to providing electric services, RECs provide critical jobs and tax revenue in rural areas, employing more than 71,000 people and paying $1.4 billion in state and local taxes annually.

Electric cooperatives operate at cost and without a profit incentive. NRECA's member cooperatives include 63 generation and transmission ("G&T") cooperatives and 834 distribution cooperatives. Six G&T cooperatives and 44 distribution cooperatives operating in Minnesota are NRECA and MREA members. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end-of-line co-op consumer-members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

II. STATEMENT OF RELATIONSHIP TO PARTY OR SUGGESTED OUTCOME

Rule 129.01 requires that an applicant "identify the party supported or indicate whether the amicus brief will suggest affirmance or reversal." If leave is granted, NRECA and MREA intend to suggest reversal of the court of appeals' decision in *EnergyForward*.

III. STATEMENT OF WHY PARTICIPATION OF AMICI CURIAE IS DESIRABLE

The sweep of the court of appeals' reasoning in its published *EnergyForward* decision gives Minnesota law potential national effect. As construed in that decision, the MPUC's jurisdiction to withhold action to study a proposed energy facility's potential environmental effects is not constrained by the location of environmental effects or of their causes, and the constitutional presumption against extraterritorial reach does not apply to state environmental-review statutes. 2019 WL 7042812, at *5–6.

As that decision construes the Minnesota Environmental Policy Act ("MEPA"), all that is needed to require a Minnesota agency to conduct environmental review of an out-of-state facility is "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly." *Id.* at *3 (quoting Minn. R. 4410.0200, subp. 65 (definition of "project")). Because, under the decision below, "[a]ny governmental approval that is necessary for a physical activity to occur is an indirect cause of the activity," *id.* at *4, MEPA's reach now extends to every situation in which a Minnesota agency, by withholding an approval, could stop physical activities with environmental effects from occurring.[1]

[1] Although *EnergyForward* makes passing reference to the close proximity of the proposed facility to Minnesota, the decision does not make proximity a controlling

If the published decision below stands, the reach of its logic will be truly sweeping. For example, if a subsidiary of a public utility serving customers in Minnesota (and perhaps elsewhere) were chosen to construct and operate a solar farm in Arizona, and the plans included relocating one dozen saguaro cacti, the MPUC might be forbidden to approve an affiliated-interest agreement between that utility and the subsidiary without first performing an Environmental Assessment Worksheet ("EAW") or Environmental Impact Statement regarding the impact of the Arizona solar farm on protected Arizona cacti.

The decision below erroneously assumed that requiring MEPA analysis of an out-of-state facility would raise no extraterritoriality problem because MEPA "merely provides a mechanism for informing the commission's decision." *Id.* at *6. But MEPA's "mechanism" relies on a series of red lights preventing projects from going forward until the level of analysis ultimately deemed necessary is finished. *Allen v. City of Mendota Heights*, 694 N.W.2d 799, 803 (Minn. App. 2005) ("MEPA and the environmental-review rules specifically mandate that environmental review of projects take priority by prohibiting granting a permit, approving a project, or beginning a project until the environmental-review process is complete."), *review*

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factor. Rather, MEPA's reach depends on whether a "'potential for significant environmental effects'" results from the facility's "'***nature or*** location,'" *id.* at *4 (emphasis added) (quoting Minn. Stat. § 116D.04, subd. 2a(e)). That is, a facility's "nature" can be sufficient to trigger MEPA, regardless of its "location."

denied (Minn. June 14, 2005). Moreover, while MEPA may initially require an EAW, whether an EAW is sufficient is clear only in retrospect. Depending on the analysis (and the outcome of any litigation asserting that additional review must occur), Minnesota law may require those lights to remain red for years.[2] Because the decision below construed "project" to include affiliation agreements that are a "but-for" cause of an out-of-state facility with potential environmental effects, *EnergyForward,* 2019 WL 7042812, at *4, the precedents just established would effectively prevent work from beginning or continuing on facilities in other states.

MEPA's "red light" mechanism is enough to require a full extraterritoriality analysis. "Under the Commerce Clause, a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). "Extraterritorial reach invalidates a state statute when the statute requires people or businesses to conduct their out-of-state commerce in a certain way." *Id.* Put another way, "a statute has extraterritorial reach

[2] For example, a case was filed in 2013 in which MEPA was applied to a Red River flood-control project—but the "red lights" against full progress went on in 2015, and were being adjusted by a Minnesota federal court as recently as April 2019. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, No. 13-2262, 2015 WL 2251481, at *24 (D. Minn. May 13, 2015); *Richland/Wilkin*, 2019 WL 1516934, at *1 (D. Minn. Apr. 8, 2019).

when it necessarily requires out-of-state commerce to be conducted according to in-state terms." *Id*. at 794.

The principle preventing extraterritorial state regulation of energy generation or transmission is vital to the increasingly interconnected energy markets in which NRECA and MREA members buy and sell power. If states are allowed to stop, even temporarily, a necessary step to creation of generation or transmission facilities beyond their borders, multiple states are likely to enact conflicting regulations potentially affecting the same facilities, striking different balances between various objectives. If Minnesota can hold up an out-of-state natural-gas facility in this fashion, coal-producing states could hold up out-of-state wind farms in the same fashion. Inconsistent regulations from state to state could render regional power markets ever more impractical to administer, increasing the costs faced by NRECA and MREA members (and their customers).

The State, while taking no position, emphasizes circumstances that "are unlikely to be presented in the future." Whether or not the State correctly describes the case, the court of appeals did not limit its decision to cases in which those factors are present—it did the opposite. *EnergyForward* declared that the reach of the governing Minnesota statutes does not depend on the location of the facility involved. Even if the court of appeals could hypothetically have written a decision

creating less of a wake, it instead published a sweeping decision with potential national impact. That should not be Minnesota courts' last word.

An amicus brief from NRECA and MREA is desirable because the issues raised by this case affect interests extending far beyond those of the parties to this action. These amici can offer valuable experience and perspective about the important issues involved. Even though most RECs in Minnesota are not subject to the same degree of MPUC regulation as public utilities, the outcome here affects amici's members. RECs receive a substantial amount of electricity for their customers through the MISO electric grid,[3] and much of the energy pooled into the MISO network is generated by, or transmitted through, facilities owned by public utilities. In addition, as here, facilities are often jointly developed by RECs and public utilities. If construction of new generation or transmission facilities affiliated with public utilities is hindered, all types of electric utilities can be harmed, regardless of whether they are directly regulated by PUCs.

CONCLUSION

For the reasons set forth above, NRECA and MREA respectfully request that the Court grant them leave to participate as amici.

[3] *See North Dakota v. Heydinger,* 825 F.3d 912, 915, 921 (8th Cir. 2016) (explaining the MISO grid).

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CERTIFICATE OF DOCUMENT LENGTH

This brief complies with the word limitations of Minn. R. Civ. App. P. 129.01. The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 1,492 words, exclusive of the caption and signature block.

s/ John M. Baker
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