ENVIRONMENTAL &
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February 1, 2023

Senator Nick Frentz
Minnesota Senate Energy, Utilities, Environment, and Climate Committee
95 University Avenue W.
Minnesota Senate Bldg.
St. Paul, MN 55155

Dear Chair Frentz,

I have reviewed Senate File 4 (SF 4) and find that it seeks to achieve legitimate energy policy goals in a manner that is consistent with the U.S. Constitution. SF 4 follows a well-established regulatory model that has withstood legal challenges in federal courts.

For the past decade, I have been tracking Constitutional challenges to state energy laws, with a focus on preemption and dormant Commerce Clause claims. SF 4 respects the Constitutional limits of state authority. The bill's carbon-free standard places legal obligations only on Minnesota utilities that deliver energy to consumers in Minnesota. It does not regulate entities outside of Minnesota or impose terms and conditions on interstate transactions that might be preempted by the Federal Energy Regulatory Commission (FERC).

The Eighth Circuit's 2016 decision in *Heydinger* striking down provisions of the 2007 Next Generation Energy Act is not applicable. The provisions at issue in *Heydinger* banned "imports" of coal-fired power. Each member of the three-judge panel found a different reason for finding the import ban unconstitutional. One judge concluded that the provision sought to police interstate power flows and violated the dormant Commerce Clause's prohibition against regulating out-of-state transactions. Another judge found this reading "not reasonable" but concluded that the import ban was preempted by FERC's regulation of interstate power sales. The third judge held that related provisions about carbon offsets were preempted by the federal Clean Air Act. This split decision has little precedential value.

Nonetheless, SF 4 avoids each of those legal infirmities. It does not regulate energy imports, ban interstate purchases, or mandate carbon offsets. Instead, it provides

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Minnesota utilities with the flexibility to meet the carbon-free standard by generating or procuring power or by buying renewable energy credits. This model is on solid legal ground. More than half of states enforce similar laws. In 2015, the U.S. Court of Appeals for the Tenth Circuit dismissed a dormant Commerce Clause challenge filed against Colorado's similar renewable energy standard. In 2017, the Second Circuit dismissed a challenge to Connecticut's standard. In 2018, the Second and Seventh Circuits each rejected preemption and dormant Commerce Clause claims against Illinois and New York programs requiring utilities to purchase energy credits priced at the social cost of carbon from certain carbon-free power plants. Detailed information about these cases is available on my website, statepowerproject.org.

Should any party challenge SF 4 as unconstitutional, the balance of legal authority will weigh heavily in favor of Minnesota. I'd be happy to provide additional information that might assist you and your colleagues as you deliberate over a carbon-free standard.

Sincerely,

/s
Ari Peskoe
Director
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