LETTER OPINION
95-L-27

February 7, 1995

Honorable Kit Scherber
State Senator
Senate Chambers, State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Senator Scherber:

Thank you for your letter asking whether subdivision 1 of Minn. Stat. ? 216B.2423 constitutes an unconstitutional restraint of interstate commerce. That section provides:

> Subdivision 1. Mandate. A public utility . . . that operates a nuclear-powered electric generating plant within this state must construct and operate, purchase, or contract to construct and operate: (1) 225 megawatts of electric energy installed capacity generated by wind energy conversion systems within the state by December 31, 1998; and (2) an additional 200 megawatts of installed capacity so generated by December 31, 2002.

The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." U.S. Const., art. 1, ? 8, cl.3. The basic purpose of the Commerce Clause was the creation of a "federal free trade unit" to foster "material success" and "the peace and safety of the Union." H.P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 533 and 538 (1949). The Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . has as its corollary that the states are not separable economic units." H.P. Hood, 336 U.S. at 537-38.

Ordinarily this office would not render an opinion concerning the constitutionally of the law of another state. However, in your letter you relate your concern that North Dakota businesses are being deprived of an opportunity to create a wind farm in North Dakota by the provisions of Minn. Stat. ? 216B.2423 which require that the wind generation conversion systems be located within the state of Minnesota. Because this law appears to have had a direct impact on a potential new industry in this state, I will make an exception to the

rule.

Your question asks about a statute which discriminates against interstate commerce on its face. As noted in a recent concurring opinion issued by Justice Scalia, analysis under dormant Commerce Clause jurisprudence is much less complicated when it involves a statute which imposes "facial discrimination." See West Lynn Creamery, Inc. v. Healy, ____ U.S. ____, 114 S.Ct. 2205, 2220 (1994). Therefore, in answering your question, I will limit my analysis to whether Minn. Stat. ? 216B.2423 facially discriminates against interstate commerce.

In Hughes v. Oklahoma, 441 U.S. at 335-37, the Court noted that the regulation involved in that case "on its face discriminates against interstate commerce. . . . Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose. . . . At a minimum such facial discrimination invokes the strictest scrutiny [of the state interest]." In Wyoming v. Oklahoma, 502 U.S. ____, 112 S.Ct. 789 (1992), the Court analyzed a statute which facially discriminates against interstate commerce. In that case, the Court determined that an Oklahoma law, that required Oklahoma coal-fired electric generation plants to run a mixture of coal that contained at least 10 percent Oklahoma-mined coal, violated the dormant Commerce Clause both on its face and in effect. Id. In my opinion, the law you inquired about, Minn. Stat. ? 216B.2423, is an even clearer instance of facial discrimination than the law at issue in Wyoming v. Oklahoma.

The Supreme Court consistently treats one kind of state interest in discriminatory statutes or regulations as wholly illegitimate, "the interest of giving those within the state an economic advantage against people elsewhere." Michael E. Smith, "State Discriminations against Interstate Commerce," 74 Calif. L. Rev. 1203, 1234 (1986). Justice Cardozo in Baldwin v. G.A.F. Selig, Inc., 294 U.S. 511, 522, 527 (1935), condemned as illegitimate the aim to "suppress or mitigate the consequences of competition between the states," or to establish "an economic barrier against competition with the products of another state or the labor of its residents."

It is my opinion that Minn. Stat. ? 216B.2423 is a clear example of a statute that facially discriminates against interstate commerce. Whether that statute would survive the "strictest scrutiny" given such laws under the Commerce Clause is a factual question that I cannot address in this opinion. However, as Professor Smith notes, the vast majority of laws which discriminate against interstate commerce on their face are determined to violate the Commerce Clause. 74 Calif. L. Rev. at 1239-1241, 1246-1249.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

lgw/jjt