



David R. Moeller, Attorney – Legal Services

Fax 218-733-3955 / E-mail dmoeller@allete.com

May 2, 2007

VIA E-FILING

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

Re: In the Matter of the Petition of Excelsior Energy for Approval of a Power Purchase Agreement for the Mesaba Energy Project
MPUC Docket No. E6472/M-05-1993
OAH Docket No. 12-2500-17260-2

Dear Dr. Haar:

Enclosed please find Minnesota Power's Exceptions to ALJs' Findings of Fact, Conclusions of Law, and Recommendation in the above-referenced Docket. An Affidavit of Service is also enclosed.

Please contact me at the number below should you have any questions regarding this filing.

Yours truly,

David R. Moeller

DRM:sr

Enc.

c: Service List

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

In the Matter of a Petition by
Excelsior Energy, Inc. for Approval
Of a Power Purchase Agreement, Under
Minn. Stat. § 216B.1694,
Determination of Least Cost
Technology, and Establishment of a
Clean Energy Technology Minimum
Under Minn. Stat § 216B.1693

PUC Docket No. E-6472/M-05-1993
OAH Docket No. 12-2500-17260-2

**MINNESOTA POWER'S
EXCEPTIONS TO ALJS' FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDATION**

I. INTRODUCTION

Minnesota Power is in full agreement with Administrative Law Judges (“ALJs”) Mihalchick’s and Johnson’s conclusion that Excelsior Energy’s Petition should be denied, and that the final Power Purchase Agreement (“PPA”) be disapproved. The strength of the findings or the correctness of those ultimate conclusions are not altered by the fact that Minnesota Power respectfully disagrees with a few, limited details in the Report. One ultimate conclusion was that the Mesaba Project is not an Innovative Energy Project (“IEP”) because it does not meet the statutory definition under Minn. Stat. § 216B.1694, subd. 1(1). Findings 45, 75 and 95. If the Minnesota Public Utilities Commission (“Commission”) agrees with Minnesota Power’s assertion as set forth below and modifies the ALJs’ separate findings (Findings 89 and 92) that the Mesaba Project is “capable of offering a long-term supply contract at a hedged, predictable cost” under Minn. Stat. § 216B.1694, subd. 1(2), the Commission would be providing an additional reason why the ALJs were correct in finding the Mesaba Project is not an IEP.

II. ANALYSIS

A. The ALJs' Report should be Accorded Deference

The findings and conclusions supporting the ALJs' recommendations find ample support in the record. ALJs Mihalchick and Johnson thoroughly reviewed the record and laid out their analysis in 75 pages of detailed findings and conclusions. To reach their decision, ALJs Mihalchick and Johnson clearly reviewed thousands of pages of evidence, including the written testimony of 46 witnesses, as well as hundreds of communications from the three public hearings. Sifting through that voluminous record, ALJs Mihalchick and Johnson crafted lengthy and detailed findings pertaining to numerous highly-technical and complex statutory issues. Their review was very insightful, reflected significant original research and supplied appropriate record documentation. Therefore, Judges Mihalchick's and Johnson's conclusions are largely irrefutable.

While the Report is not technically binding on the Commission, Minnesota Power respectfully requests that the Commission follow the ultimate recommendations to deny the Petition. Following those recommendations is fully consistent with the record development in this contested case as well as with Minnesota law and Commission precedent. In addition, while courts generally defer to agency decisions, Minnesota courts have specifically found that an agency itself owes deference to the recommendations of an ALJ even if his or her findings are not legally binding. *See Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 606 N.W.2d 697, 706 (Minn. Ct. App. 2000); *Bloomquist v. Commissioner of Natural Resources*, 704 N.W.2d 184, 190 (Minn. Ct. App. 2005) (“...the agency should not take lightly the ALJ's findings.”)

Furthermore, Minn. Stat. § 14.62, subd 1, requires an agency to provide reasons for an agency to reject or modify an ALJ's recommendation. Otherwise, failure to follow the ALJ's decision without record support and explanation would be arbitrary under the Minnesota Administrative Procedures Act. *See Petition of Northern States Power Gas Utility*, 519 N.W.2d 921, 925 (Minn. Ct. App. 1994). Finally, an agency may not undertake a speculative approach to

an ALJ's recommendation that is rationally based on the complete record. *See In re Application of Orr*, 396 N.W.2d 657, 662 (Minn. Ct. App. 1986) (classifying commissioner's decision contradicting agency's own experts and ignoring ALJ's suggestions as arbitrary.).

Minnesota case law supports the Commission adopting Judges Mihalchick's and Johnson's ultimate recommendation to deny Excelsior Energy's Petition. The record more than amply supports this core finding and conclusion and denying the Petition is the only reasonable result based on the facts in the record.

B. Excelsior Energy is Not Capable of Offering a Long-Term Supply Contract at a Hedged, Predictable Cost

In order to qualify as an Innovative Energy Project ("IEP") Excelsior Energy is required to certify that the Mesaba Project is "capable of offering a long-term supply contract at a hedged, predictable cost." Minn. Stat. § 216B.1694, subd. 1(2). Minnesota Power and Xcel Energy asserted that Excelsior Energy does not meet this statutory requirement based on Excelsior Energy's lack of a fuel supply plan and other inherent project risks that preclude offering a long-term supply contract at a hedged, predictable price. *See* Minnesota Power's Initial Brief at 6-12; Xcel Energy's Initial Brief at 22-27.

In analyzing this issue, the ALJs agreed that Excelsior Energy's lack of a fuel supply plan was a significant issue. The ALJs correctly stated: "Until [Excelsior Energy] develops a portfolio of fuel and transportation agreements, Excelsior Energy will have no hedge against future coal prices through an assured source for future fuel at a known price." Finding 86. The ALJs also noted that "...it cannot be found that Excelsior Energy is capable of obtaining fuel for the Project at a favorable price." Finding 89. However, in reviewing the statutory requirement, the ALJs found that Excelsior Energy "is certainly capable of negotiating a portfolio of agreements of varying terms so that its fuel costs would be hedged, and relatively predictable and stable." Finding 89; *see also*, Finding 92.

Minnesota Power agrees with the ALJs' findings regarding Excelsior Energy's expected high fuel costs and other inherent risks in waiting on yet to be negotiated rail and fuel contracts to meet the Mesaba Project's "large need for coal." Finding 89. What Minnesota Power takes exception with is the ultimate conclusion that Excelsior Energy meets the "capable" and "long-term" requirements in Minn. Stat. § 216B.1694, subd. 1(2). First, as noted by the ALJs, Excelsior Energy's "current [fuel] plan [is] to rely on short-term contracts." Finding 92. Excelsior Energy's future reliance on short-term contracts proves that its own plans will not meet the "long-term" requirement in the statute. Second, Excelsior Energy has not demonstrated that it is capable of obtaining any length of contract since it has not obtained any existing fuel supply or transportation contracts and does not anticipate beginning negotiations for another three to four years. Finding 86. To be "capable" requires a showing of an established track record, something Excelsior Energy admits it has not yet accomplished.

Finally, the ALJs' finding that Excelsior Energy is capable of negotiating agreements so that fuel costs can be hedged, albeit not at a favorable price, (Finding 89) sets the bar too low to protect ratepayers. While the ALJs correctly found that the Commission should look beyond Excelsior Energy's "certification" (Finding 76) in construing Minn. Stat. § 216B.1694, subd. 1(2), the finding that because Excelsior Energy, in theory, could some day enter into "a long-term supply contract at a hedged, predictable cost" as part of future negotiations (Finding 89) would mean almost any entity with the legal capacity to contract meets the "capable" test. The Commission has addressed what "capable" means in another context: service territory acquisition compensation under Minn. Stat. § 216B.44. The Commission and courts have declared that a displaced host utility is due compensation for lost service territory where the utility has facilities in place capable of serving the service territory. *See In re City of Rochester*, Docket No. E-299, 132/SA-93-498, Order dated November 30, 1995; *In the Matter of the Complaint of Kandiyohi Cooperative Electric Power Association*, 455 N.W.2d 102, 105-6 (Minn. Ct. App. 1990). In that context "capable" means having actual facilities that can provide service to customers in the "near term". *Id.* The Commission and courts tied "capable" to serving customers, not a utility's potential to someday serve customers' needs under yet to be determined circumstances. Likewise, Excelsior Energy's is not capable (or planning) to enter

into a long-term supply contract that would provide a hedged, predictable price in the near term and doing so in the long term is speculative at best.

While the ALJs made a separate and correct recommendation that the Mesaba Project is not an IEP (Finding 95), Minnesota Power respectfully requests that Commission also declare the Mesaba Project is not an IEP under Minn. Stat. § 216B.1694, subd. 1(2).

Dated: May 2, 2007

Respectfully submitted,

/s/ David R. Moeller _____

David R. Moeller

Attorney

Minnesota Power

30 West Superior Street

Duluth, MN 55802

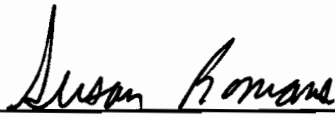
218-723-3966

dmoeller@allete.com

STATE OF MINNESOTA)
) ss
COUNTY OF ST. LOUIS)

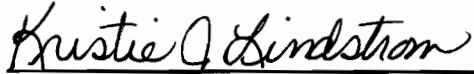
AFFIDAVIT OF SERVICE VIA
VIA E-FILING, E-MAIL AND
FIRST CLASS MAIL

Susan Romans of the City of Duluth, County of St. Louis, State of Minnesota, says that on the 2nd day of May, 2007, she served Minnesota Power's Exceptions to ALJs' Findings of Fact, Conclusions of Law, and Recommendation in MPUC Docket No. E6472/M-05-1993/OAH Docket No. 12-2500-17260-2 to Burl Haar and Sharon Ferguson via e-Filing. The persons on the attached Service List were served via First Class Mail and e-mail.



Susan Romans

Subscribed and sworn to before
me this 2nd day of May, 2007.



Notary Public



**In the Matter of a Petition by Excelsior Energy, Inc.
Administrative Law Judges' Service List as April 20, 2007**

Commission and Administrative Law Judges

Burl W. Haar
Public Utilities Commission
Suite 350
121 East Seventh Place
St. Paul, MN 55101-2147

Steve M. Mihalchick
Office of Administrative
Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401-2138

Bruce H. Johnson
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401-2138

Parties

Sharon Ferguson
Department of Commerce
85 7th Place East, Suite 500
St. Paul, MN 55101-2198

Julia Anderson
Assistant Attorney General
1400 Bremer Tower
445 Minnesota St
St. Paul, MN 55101-2131

Valerie M. Smith
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131

Thomas L. Oстераas
Excelsior Energy
11100 Wayzata Blvd, Suite 305
Minnetonka, MN 55305

Byron E. Starns
Leonard, Street and Deinard
150 S. 5th Street, Suite 2300
Minneapolis, Minnesota 55402

Scott G. Harris
Leonard, Street and Deinard
150 S. 5th Street, Suite 2300
Minneapolis, Minnesota 55402

Brian M. Meloy
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

Christopher Clark
Xcel Energy
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401

Michael C. Krikava
Briggs and Morgan
2200 IDS Center
Minneapolis, MN 55402

SaGonna Thompson
Xcel Energy
414 Nicollet Mall, 7th Floor
Minneapolis, MN 55401-1993

Judy Pofel
Xcel Energy Services, Inc.
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401

Chuck Kerr
Great Northern Power Develop. LP
601 Jefferson Street, Suite 3600
Houston, TX 77002-7906

David R. Moeller
Minnesota Power
30 West Superior Street
Duluth, MN 55802-2093

William E. Flynn
Lindquist & Vennum
4200 IDS Center
80 S 8th Street
Minneapolis, MN 55402

Antone J. Rude
Great Northern Power Develop. LP
10127 93rd Street N.E.
Monticello, MN 55362

Bray Dohrwardt
Briggs and Morgan, P.A.
2200 IDS Center
80 South 8th St
Minneapolis, MN 55402

Carol Overland
Overland Law Office
P O Box 176
Red Wing, MN 55066

John E. Drawz
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402-1425

Mollie M. Smith
Fredrikson & Byron, P.A.
200 S. 6th Street. Suite 4000
Minneapolis, MN 55402-1425

Steven J. Quam
Fredrikson & Byron, P.A.
200 S. 6th Street. Suite 4000
Minneapolis, MN 55402-1425

William A. Blazar
Minnesota Chamber Of Commerce
400 Robert St. North, Suite 1500
St. Paul, MN 55101

Mike Franklin
Minnesota Chamber Of Commerce
400 Robert Street N, Suite 1500
St. Paul, MN 55101

Elizabeth Goodpaster
Minnesota Center For
Environmental Advocacy
26 E. Exchange St., Suite 206
St. Paul, MN 55101-1667

Eric F. Swanson
Winthrop & Weinstine, P.A.
225 South Sixth St, Suite 3500
Minneapolis, MN 55402

Robert S. Lee
Mackall, Crouse & Moore, PLC
1400 AT&T Tower
901 Marquette Ave
Minneapolis, MN 55402

Todd J. Guerrero
Lindquist & Vennum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2274

David Sasseville
Lindquist & Vennum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2274

Mark Rolfes
Otter Tail Power Company
215 South Cascade Street
P.O. Box 496
Fergus Falls, MN 56538-0496

Kathleen L. Winters
Assistant Attorney General
900 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127

Nico Kieves
Excelsior Energy Inc.
11100 Wayzata Blvd, Suite 305
Minnetonka, MN 55305

Richard J. Savelkoul
Felhaber Larson Fenlon & Vogt
444 Cedar Street, Suite 2100
St. Paul, MN 55101-2136

Kevin Reuther
Minnesota Center For
Environmental Advocacy
26 E. Exchange St., Suite 206
St. Paul, MN 55101-1667

Non-party Participants

Annette Henkel
Minnesota Utility Investors
405 Sibley Street, #227
St. Paul, MN 55101

David M. Aafedt
Winthrop & Weinstine, P.A.
225 South Sixth St, Suite 3500
Minneapolis, MN 55402

Jerry Larsen
HPC-LLC
4610 IDS Center
80 S. 8th Street
Minneapolis, MN 55402

Peter H. Grills
W2800 First National Bank Bldg
332 Minnesota Street
St. Paul, MN 55101

Robert H. Schulte
Schulte Associates LLC
9072 Palmetto Drive
Eden Prairie, MN 55347

Steven Clemmer
Clean Energy Research Director
Union of Concerned Scientists
2 Brattle Sq, 6th Floor
Cambridge, MA 02238
(email only)

Michael Gregerson
Stability Consulting, Inc.
3215 Rosewood Lane North
Plymouth, MN 55441

RD Thomas and Assoc., Inc.
2716 West River Parkway
Minneapolis, MN 55406
(email only)

Email service list

Parties

susan.mackenzie@state.mn.us
janet.gonzalez@state.mn.us
steve.mihalchick@state.mn.us
bruce.johnson@state.mn.us
maria.lindstrom@state.mn.us
julia.anderson@state.mn.us
christopher.b.clark@xcelenergy.com
tomosteraas@excelsiorenergy.com
sharon.ferguson@state.mn.us
squam@fredlaw.com
msmith@fredlaw.com
jdrawz@fredlaw.com
dmoeller@allete.com
overland@redwing.net
christophergreenman@excelsiorenergy.com
byron.starns@leonard.com
brian.meloy@leonard.com
scott.harris@leonard.com
teresa.j.kowles@xcelenergy.com
jennifer.sanner@xcelenergy.com
nicok@excelsiorenergy.com
kreuther@mncenter.org
kathleen.winters@state.mn.us

mkrikava@briggs.com
valerie.smith@state.mn.us
bdohrwardt@briggs.com
bblazar@mnchamber.com
dsasseville@lindquist.com
tguerrero@lindquist.com
rsl@mcmlaw.com
eswanson@winthrop.com
bgoodpaster@mncenter.org
mrolfes@otpc.com
apm@mcmlaw.com
rsavelkoul@felhaber.com
wflynn@lindquist.com

Non-Party Participants

daafedt@winthrop.com
ahenkel@mutilityinvestors.org
jerome.larsen@hpc-llc.com
rhs@schulteassociates.com
pete.grills@grillslegal.com
sclemmer@ucsusa.org
jshaddix@janetshaddix.com
rdthomasinc@earthlink.net