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

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

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

FIFTH PREHEARING ORDER

This matter is before Administrative Law Judges Steve M. Mihalchick and Bruce H. Johnson on the motion of mncoalgasplant.com (MCGP) dated June 20, 2006, to modify protective order, and in the alternative, motion for declaratory judgment. Carol A. Overland, Overland Law Office, 402 Washington Street South, Northfield, MN 55057, represents mncoalgasplant.com (MCGP).

Based on all the files and proceedings herein, the Administrative Law Judges make the following:

ORDER

(1) MCGP's motion to modify the Protective Order issued on June 5, 2006, is DENIED;

(2) MCGP's motion for declaratory judgement is also DENIED;

(3) However, pursuant to subparagraph 1(c)(ii)(F) of the Protective Order, MCGP has shown that the interest MCGP seeks to protect in thos proceeding reasonably requires access to Trade Secret Information, as defined in the Protective Order; and

(4) MCGP is therefore GRANTED access to Trade Secret Information, as defined in the Protective Order.

Dated: August 12, 2006

STEVE M. MIHALCHICK
Administrative Law Judge

BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

MEMORANDUM

On June 5, 2006, a Protective Order was issued in this proceeding governing parties' access to and use of trade secret information[1]. Paragraph 1(c)(ii)(F) of that Protective Order provided:

> (F) Non-utility or non-power producer Parties shall not have access to Trade Secret Information absent a showing that the interest they seek to protect reasonably requires it.

On June 20, 2006, Mncoalgasplant.com (MCGP) filed a Motion to Modify Protective Order, and in the Alternative, Motion for Declaratory Judgment. It sought first to modify the Protective Order by deleting paragraph 1(c)(ii)(F). Alternatively, it sought a ruling that it had made a sufficient showing to have access to trade secret information, as required by paragraph 1(c)(ii)(F).[2]

On July 5, 2006, both Xcel Industrial Intervenors (XLI[3]) and Excelsior Energy Inc. (Excelsior) filed responses to MCGP's motion. Rather than deleting paragraph 1(c)(ii)(F), XLI sought to replace it with the following:

> (F) Non-utility or non-power producer Parties that have been granted party status to this proceeding and have executed the attached Nondisclosure Agreement, shall be entitled to be a Requesting Party and entitled to receive Trade Secret Information and Nonpublic Data unless Excelsior demonstrates that the interests in protecting such information greatly outweigh the interests in providing access to such information.

It was Excelsior's position that no change to the Protective Order was necessary.

[1] The Protective Order was also directed at not public information within the meaning of Minn. Stat. ch. 13, the use of which in this proceeding is not at issue in the pending motion.
[2] ALJs do not have general jurisdiction, including the authority to enter declaratory judgments. They do, however, have the authority under Minn. R. 1400.6700 to rule on discovery requests.
[3] In its submission Xcel Industrial Intervenors identified itself with the initials "XLI."

Scope of Discovery

The Protective Order in question relates to the scope of discovery in this proceeding—namely, to questions of who may request and receive trade secret information. Of the submissions received relating to modification of that Protective Order, Excelsior's comes closest to the mark in describing the scope of discovery in administrative contested cases. "[I]t has never been held that the Constitution of the United States requires that discovery procedure be adopted by any court."[4] In fact, discovery was essentially unknown in American civil jurisprudence until changes to the rules of civil procedure created it in the mid-20th century. There is no general right to discovery in the federal Administrative Procedure Act,[5] although some federal agencies have adopted rules allowing various degrees of discovery in their own administrative adjudications. Minnesota's Administrative Procedure Act[6] contains no statutory right of discovery. Rather, the right of parties to discovery in Minnesota contested case proceeding is predicated solely on Minn. R. 1400.6700. Subpart 2, of that rule allows "[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota."

However, Minn. R. 1400.6700, subp. 2, goes on to establish a fundamental difference in the way that discovery operates in administrative contested cases and the way that it operates in civil cases in district court. Minn. R. Civ. P. 26.02(a) provides in relevant part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party… Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of relevant evidence.

Under Minn. R. Civ. P. 26.03, the burden is on a party resisting discovery to seek an "order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense…" By contrast Minn. R. 1400.6700, subp. 2, provides in relevant part:

> If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case…

In other words, in a civil action the burden is on the party resisting discovery to show that it is irrelevant or unduly burdensome. By contrast, in a contested case

---

[4] *Starr v. Comm. of Int. Rev.*, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied, 350 U.S. 993 (1956).
[5] 5 U.S. C. §§ 501 *et seq.*
[6] Minn. Stat. ch. 14.

the burden is on the party seeking discovery to show that it is necessary. Put another way, the law requires administrative law judges to exercise more control over discovery in contested cases than normally occurs in civil court cases.[7] Against, this backdrop the burden placed on non-utility or non-power producer parties in paragraph 1(c)(ii)(F) is a natural extension of the requirement in Minn. R. 1400.6700, subp. 2, and is not unduly burdensome. Deletion of paragraph 1(c)(ii)(F) of the Protective Order is not warranted.

MCGB Should Be Granted May Obtain Access to Trade Secret Information

Alternatively, MCGB requested a ruling that it had made a sufficient showing under paragraph 1(c)(ii)(F) to have access to trade secret information. In its Petition for Intervention, MCGP identifies itself as follows:

> Mncoalgasplant.com is an informal association of landowners and residents of the area immediately adjacent to the "west" site northeast of Taconite. Two members are landowners who live on Dunning Lake, and eight others are landowners who live along Diamond Lake and Diamond Lake Road. Others own property in the area and will be affected by the plant and connecting infrastructure.[8]

MCGP's primary interest in this proceeding is examination of the benefits and costs of the infrastructure that will be required to support the project, which it maintains is a component of "the costs of ancillary services" that Minn. Stat. § 216B.1693 requires the Commission to consider in determining whether the technology is or is likely to be a least cost resource." MCGP also maintains that infrastructure costs are an aspect of the overall public interest that the Commission must consider in determining whether to the project to proceed. MCGP should be allowed to present its views and positions on costs in the context of total project costs. It should not have to rely on other parties to present its views and positions in that larger context. In short, MCGP has shown generally it needs access to trade secret information for the proper presentation of the its case within the meaning of Minn. R. 1400.6700, subp. 2, and specifically has shown "that the interest they seek to protect reasonably requires [access to trade secret information]" within the meaning of paragraph 1(c)(ii)(F) of the Protective Order.

---

[7] Rulings on discovery issues in administrative proceeding are only subject to an abuse of discretion standard. *See Surf & Sand Nursing Home v. Dep't of Human Services*, 422 N.W.2d 513, 514 (Minn. App. 1988).
[8] MCGB's Petition for Intervention at p. 2.

The Response of Xcel Industrial Intervenors

The response filed by XLI raises some peripheral issues that may need to be addressed. However, there is currently no party to this proceeding bearing the name Xcel Industrial Intervenors. If there is such an entity, for example, as the successor in interest to one or more existing intervenors, then a substitution of parties must be filed to establish XLI's status as a party and its standing to participate in future proceedings. Second, XLI's suggested modification of the Protective Order goes beyond what MCGB requested and may raise other issues. Accordingly, if XLI is able to establish its party status and wishes to seek its own modification of the Protective Order, then it needs to file its own motion and give other parties an opportunity to respond to it.

S. M. M.
B. H. J.