

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 Minn. Stat. § 216B.1694, Determination of Least Cost Technology, and Establishment of a Clean Energy Technology Minimum Under Minn. Stat. § 216B.1693

DOCKET NO. E-6472/M-05-1993

OAH DOCKET NO.: 12-2500-17260-2

PROTECTIVE ORDER

BACKGROUND:

1. This matter was referred to the Office of Administrative Hearings by the Minnesota Public Utilities Commission (Commission) for a contested case hearing in its Notice and Order for Hearing and Order Granting Intervention Petition issued on April 25, 2006, in the above-entitled docket.

2. During the proceedings in this matter, Parties may file, request and use trade secret information or nonpublic data, as defined by Minnesota Statutes chapter 13.01, *et seq.* (Trade Secret Information or Nonpublic Data).

3. Minnesota Statutes section 14.60, subdivision 2 allows the Administrative Law Judge in a contested case to conduct a closed hearing to discuss trade secret or nonpublic data, issue necessary Protective Agreements and Orders (hereinafter referred to as the "Protective Order"), and seal all or part of the hearing record.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Trade Secret Information and Nonpublic Data.

(a) All Trade Secret Information and/or Nonpublic Data shall be furnished pursuant to the terms of this Protective Order, and shall be treated by all persons accorded access thereto pursuant to this Protective Order as constituting confidential, competitive, trade secret, and business information, and shall be used solely for the purpose of this proceeding (discovery, testimony, comments, information requests, motions, cross-examination and argument) and solely in accordance with this Protective Order, and shall not be used or disclosed for any other purpose or in any other manner. In accordance with the Commission's September 1, 1999, Revised Procedures for Handling Trade Secret and Privileged Data (Commission's Procedures), all documentary material claimed to be Trade Secret Information or Nonpublic Data shall be marked substantially as follows by stamping each individual page with the designation "CONTAINS TRADE SECRET INFORMATION- NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. E-6472/M-05-1993." All copies of documents so marked will be made and maintained in a manner that will facilitate maintaining confidentiality of the information. For purposes hereof, notes made pertaining to or prepared as the result of a review of Trade Secret Information or Nonpublic Data shall be subject to the terms of this Protective

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Order. Any Trade Secret Information or Nonpublic Data received in photographic, digital or electronic formats shall be identified as protected by the producing party by means appropriate to the medium and shall be handled by the recipient in a manner suitable to protect its confidentiality.

(b) Trade Secret or Non-Public Data shall not include information, which is demonstrated by the party in possession of the information;

(i) to have been in its possession or the possession of its officers, directors, employees, affiliates, or agents prior to receiving it from the disclosing party, and not subject to a confidentiality obligation, or

(ii) to have been in, the public domain prior to the disclosure of such information by the disclosing party to the receiving party, or becomes a part of the public domain through no breach of this Order by the receiving party, or

(iii) to have been supplied to the receiving party without restriction by a third party who is under no obligation to the disclosing party to maintain such information in confidence.

The party in possession of information subject to this exclusion shall inform the disclosing party claiming the information is Trade Secret or Non-Public Data that it is subject to this exclusion prior to using it in contravention of this Order.

(c) Use of Trade Secret or Nonpublic Data and Persons Entitled to Review.

(i) Persons entitled to review; use restrictions. Trade Secret Information shall only be made available to a Requesting Party that has been formally granted party status pursuant to Minnesota Rules 7829.800 or 1400.6200. All Trade Secret Information or Nonpublic Data made available pursuant to this Protective Order shall be given solely to counsel for the requesting party or other authorized persons who are designated by counsel as being the party's staff, experts or witnesses in this proceeding and who execute Exhibit A in a timely manner prior to their receipt of the Trade Secret Information and/or Nonpublic Data. Trade Secret Information and/or Nonpublic Data shall not be used or disclosed except for purposes of this proceeding. The Trade Secret Information and/or Nonpublic Data may not be used or referenced in other proceedings in Minnesota or in other jurisdictions, including but not limited to (i) use by Xcel Energy or any affiliate or consultant in connection with any evaluation or investigation of the potential use of IGCC technology in Colorado, or (ii) use by any Party in connection with any subsequent competitive bidding and/or resource acquisition process in Minnesota or other jurisdictions for the development of electric generating resources, or (iii) use by any Party or any affiliates or consultants in connection with any efforts in Minnesota or other jurisdictions to seek to develop, amend or lobby for any legislation. Unless otherwise provided in this Protective Order, all Trade Secret Information will be safeguarded and handled in accordance with the Commission's Procedures.

(ii) Limitations on Rights to Obtain Trade Secret Information. Subject to claims of privilege, relevance and other exclusions from discovery, if a discovery request has been made that calls for the production of Trade Secret Information or other Nonpublic Data, the following requirements shall apply:

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(A) The Minnesota Department of Commerce ("Department") shall be entitled to obtain and review all data (including Trade Secret Information and Nonpublic Data) it requests during this proceeding and shall not be restricted in any respect from obtaining, reviewing and utilizing any such data in connection with this proceeding.

(B) Xcel shall be entitled to be a Requesting Party and entitled to receive Trade Secret Information and Nonpublic Data proposed by Excelsior subject to the restrictions and conditions of this Protective Order.

(C) Excelsior shall be entitled to be a Requesting Party and entitled to receive Trade Secret Information from any other Party to this proceeding, provided that Excelsior comply with the restrictions and conditions of this Protective Agreement.

(D) All utility and power producer Parties (other than Xcel) shall have the right to be a Requesting Party for purposes of obtaining Trade Secret Information proposed by Excelsior, provided that access by any such Requesting Party shall be limited to their attorneys and consultants retained for this proceeding and shall comply with the restrictions and conditions of this Protective Agreement.

(E) A utility or power producer Requesting Party (other than the Department and Excelsior) shall not have the right to obtain the Trade Secret Information of any other party (other than Excelsior) to the extent that such Trade Secret Information pertains to development of electric generating facilities to be compared with or developed in lieu of Excelsior's proposal. For example, if Great Northern chooses to submit into the record a proposed electric generating facility (including Trade Secret Information) for comparison to or in lieu of Excelsior's proposal, no other party (other than Excelsior and the Department) shall be entitled to access to the Trade Secret Information associated with such proposal. Nothing in this paragraph shall limit any party's right to challenge another party's designation of "Trade Secret Information" or to seek greater public disclosure of such information.

(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.

(iii) Third-Party Protections. Prior to furnishing Trade Secret Material generated by any unaffiliated third-party to a Requesting Party, any responding party shall be allowed 48 hours to notify the affected unaffiliated third-party of the identity of the Requesting Party and the nature of the requested information. If the unaffiliated third-party objects to its disclosure to a particular Requesting Party, the responding party shall bring a motion for a protective order within 24 hours.

(iv) Copies and databases. Neither Requesting Party nor any other person who may become authorized or who otherwise may gain access to the Trade Secret Material shall copy or duplicate it in any way, in whole or in part, except to the extent necessary for reasonable use with respect to the Proceeding. Trade Secret Material shall be managed so that it can be secured

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in a manner consistent with this agreement. Trade Secret Material shall be maintained in a secure location accessible only to individuals authorized by this Agreement to review the Trade Secret Material.

(d) Nondisclosure Protective Agreement and Order. Prior to giving access to Trade Secret Information and/or Nonpublic Data as contemplated in paragraphs (a)-(b) above to any staff, expert or witness, whether or not such expert or witness is a person designated to testify in any such proceeding, counsel for the party seeking review of the Trade Secret Information and/or Nonpublic Data shall deliver a copy of this Protective Order to such person; and prior to disclosure such person shall agree in writing to comply with and be bound by this Protective Order. In connection therewith, Trade Secret Information and/or Nonpublic Data shall not be disclosed to any person who has not signed a Nondisclosure Agreement in the form which is attached hereto and incorporated herein as Exhibit A and until the 24-hour notice required by this paragraph has been given. The Exhibit A Nondisclosure Agreement shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that he or she has reviewed the same and has consented to be bound by its terms. The Nondisclosure Agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such Nondisclosure Agreement shall be delivered to counsel for the providing party at least 24 hours, excluding weekends and holidays, prior to the staff, expert or witness gaining access to the Trade Secret Information and/or Nonpublic Data. If counsel for the providing party notifies the Administrative Law Judge of an objection within the 24 hours, no Trade Secret Information and/or Nonpublic Data shall be provided to the staff, expert or witness until so ordered by the Administrative Law Judge.

3. Challenges or Other Special Requests. This Protective Order establishes a procedure for the expeditious handling of proposed Trade Secret Information and/or Nonpublic Data. It shall not be construed as an agreement or ruling on the discoverability, confidentiality or trade secret designation of any such information or document. Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents or other matters that have been designated as Trade Secret Information or Nonpublic Data removed from the protective requirements of this Protective Order or to have them handled in a manner differently than described in this Protective Order (either for greater or lesser confidentiality protections). If the trade secret or nonpublic nature of this information is challenged, resolution of the issue shall be made by the Administrative Law Judge or Commission after proceedings in camera which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such trade secret or nonpublic matter shall be present. The record of such in camera hearings shall be marked "TRADE SECRET INFORMATION-NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. E-6472/M-05-1993," unless the ALJ or Commission determines that the proceeding should not be classified as involving Trade Secret Information or Nonpublic Data. Notwithstanding anything herein to the contrary, Requesting Party may disclose the Trade Secret Information and Nonpublic Data in the event Requesting Party becomes legally compelled or required to disclose on a public basis the Trade Secret Information or Nonpublic Data to any court, administrative agency, or other governmental authority, provided that Requesting Party give the party providing the information prompt notice so that such party may at its own expense seek a protective order or other appropriate remedy prior to disclosure and/or waive compliance with this Order.

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4. Use of Trade Secret Information and/or Nonpublic Data in Comments or Pleadings.

Where reference to Trade Secret Information and/or Nonpublic Data is required in comments, pleadings, information requests, cross-examinations, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other nonconfidential description. Any further use of or substantive references to Trade Secret Information and/or Nonpublic Data shall be placed in a separate “Nonpublic” copy of the pleading or brief and submitted to the Commission or Office of Administrative Hearings pursuant to the terms of the Commission’s Procedures. This “Nonpublic” copy shall be served only on counsel of record (one copy each) who have signed a Nondisclosure Agreement. All the protections afforded in this Protective Order apply to materials prepared and distributed under this paragraph.

5. Use of Trade Secret Information and/or Nonpublic Data in Depositions.

If, in the course of depositions, counsel for any party concludes that testimony or exhibits will involve Trade Secret Information and/or Nonpublic Data, counsel shall request that the court reporter record such testimony in a confidential transcript that is marked “TRADE SECRET INFORMATION-NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. E-6472/M-05-1993.” All Exhibits which have been marked as involving Trade Secret Information and/or Nonpublic Data shall be attached to the confidential transcript and marked consistent with the Commission’s Procedures. Each party has the right to identify a transcript or exhibits as including Trade Secret Information and/or Nonpublic Data pursuant to this paragraph for up to three business days after the deposition is completed.

6. Use of Trade Secret Information or Nonpublic Data in Hearings or Commission Meetings.

The Receiving Party shall not use Trade Secret and/or Nonpublic Data in a hearing without first (a) providing prior notice to the disclosing party regarding the information to be used and (b) conferring with the disclosing party regarding limitations or procedures that can be used to avoid disclosing the confidential aspects of the information at issue to persons not otherwise entitled to receive such information. If the parties cannot reach agreement regarding the use of such information, then the dispute shall be submitted to the Administrative Law Judge or the Commission before the information is used or publicly disclosed. Without limiting the foregoing, no party shall refer to Trade Secret and/or Nonpublic Data on oral testimony, cross-examination or argument except in accordance with this paragraph.

7. Return or Destruction.

Unless otherwise ordered, all Trade Secret Information and/or Nonpublic Data, including transcripts of any depositions to which a claim of “trade secret” or “nonpublic” status is made, shall remain under seal, shall continue to be subject to the protective requirements of this Protective Order, and, except as provided in Paragraph 10, shall either (i) be returned to counsel for the disclosing party within 30 days after final settlement or conclusion of the applicable matter including administrative or judicial review thereof, or (ii) destroyed and a certificate of destruction provided to counsel for the disclosing party within such 30 days, unless otherwise agreed by the disclosing party, except that the receiving party may in all cases retain a copy of such documents to the extent required to be maintained pursuant to regulatory requirements, in which case it shall continue to be maintained subject to the protections of this Agreement.

8. Preservation of Non-Publicity.

All persons who may be entitled to receive, or who are afforded access to any Trade Secret and/or Nonpublic Data by reason of this Protective Order shall neither use nor disclose the Trade Secret and/or Nonpublic Data for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of these

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proceedings, and then solely as contemplated herein, and shall take reasonable precautions to keep the Trade Secret Information and/or Nonpublic Data secure and in accordance with the purposes and intent of this Protective Order.

9. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or documents or cross-examination on the grounds of relevancy or materiality.

10. Inadvertent Disclosure. No party shall have waived its right to designate any documents, data, information, studies, or other materials as Trade Secret Information or Nonpublic Data by inadvertent disclosure, provided the disclosing party thereafter gives written notice to the recipient(s) of such information that it should have been designated as Trade Secret Information or Nonpublic Data. From and after receipt of such notice, the previously disclosed information subsequently identified as Trade Secret Information or Nonpublic Data shall be marked as Trade Secret Information or Nonpublic Data and treated as such for purposes of this Protective Order.

11. Information Provided to State Agencies. The files of the Public Utilities Commission, the Office of Administrative Hearings, the Department of Commerce, the Office of the Attorney General, and other state agencies containing trade secret data or otherwise protected information shall be treated as required by Minn. Stat. §§ 13.01, *et seq.* and 138.161, *et seq.* and shall not be subject to the return requirements of this Protective Order. Notwithstanding the restrictions set forth in paragraphs 1-9 above, employees of the state agencies are not required to sign Exhibit A to receive Trade Secret or Non-Public information.

12. Prior Disclosures. Information exchanged between Xcel Energy and Excelsior in 2005 during negotiations of a potential power purchase agreement and a proposed transaction between the parties which is governed by the March 14, 2005 Confidentiality and Non-Disclosure Agreement shall continue to be governed by such agreement.

DATED this 5th day of June, 2006

STEVE M. MIHALCHICK
Administrative Law Judge

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EXHIBIT A
NONDISCLOSURE AGREEMENT

I, the undersigned, hereby acknowledge that I have read the attached Protective Order dated _____, 2006, in Minnesota Public Utilities Commission Docket No. E-6472/M-05-1993, OAH Docket _____, and understand the terms thereof and agree to be bound by all such terms. Without limiting the generality of the foregoing, I agree not to disclose any materials designated Trade Secret and/or Nonpublic Data to any person or entity not authorized to receive materials designated "TRADE SECRET INFORMATION-NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. E-6472/M-05-1993" under the terms of said Protective Order, or any copies or extracts of information derived therefrom, which have been disclosed to me. I further agree to use any such materials disclosed to me solely for the purpose of this proceeding and for no other purpose.

I hereby submit myself to the jurisdiction of the Office of Administrative Hearings in Minnesota and the Minnesota Public Utilities Commission and the Minnesota District Court for the Second Judicial District (Ramsey County) for the purpose of enforcing said Protective Order.

Date: _____, 2006

Signature

Type or Print Name

Address

Name of Employer

Name of Party

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