

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

SECOND PREHEARING ORDER

This matter is before Administrative Law Judges Steve M. Mihalchick and Bruce H. Johnson for determinations on scheduling and the terms of a protective order and other issues. As allowed in the First Prehearing Order, additional proposals and argument on scheduling were submitted by Excelsior Energy, Xcel Energy, GNPD, and MCGP. Excelsior Energy, Xcel Energy and GNPD submitted additional arguments on the Protective Order.

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

ORDER

Issues to be Addressed

1. The primary issues in this case are whether the Commission should:
 - (1) approve, disapprove, amend, or modify the terms and conditions of a proposed power purchase agreement that Excelsior has submitted to Xcel Energy under Minn. Stat. § 216B.1694;
 - (2) determine that the coal-fueled Integrated Gasification Cycle (IGCC) power plant that Excelsior plans to construct in northern Minnesota is, or is likely to be, a least-cost resource, obligating Xcel to use the plant's generation for at least 2% of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693; and
 - (3) determine that, under the terms of Minn. Stat. § 216B.1693, at least 13% of the energy supplied to Xcel's retail customers should come from the IGCC plant by 2013.

2. This matter is hereby bifurcated into two phases as suggested by Excelsior Energy. Phase 1 will address Mesaba Energy Project Unit I and the first two primary issues. Phase 2 will address Mesaba Energy Project Unit II and all three primary issues. A separate ALJ report will be submitted to the Commission at the conclusion of each phase. Evidence and argument received in Phase 1 may be offered for incorporation in Phase 2.

3. The parties shall file Statements of the Case at the same time they file their direct testimony. The statement should set forth the party's position on the primary issues, analyze the applicable law, generally describe the facts the party intends to prove, and demonstrate how the law and facts support the party's position on the primary issues.

4. After the direct testimony and Statements of the Case have been filed, the parties may file dispositive motions. These may be appropriate to resolve some legal issues prior to the hearing.

Schedule

5. The following schedule is adopted for Phase 1:

Discovery on All Phase 1 Issues	Ongoing to start of hearing
Petitions to Intervene (7 days to object)	June 5, 2006
Petitioner's Supplemental Testimony And Petitioner's Statement of the Case	June 19, 2006
Other Parties' Direct Testimony and Other Parties' Statements of the Case	August 14, 2006
Dispositive Motions (7 days to reply)	September 18, 2006
Rebuttal Testimony (all parties)	September 18, 2006
Surrebuttal Testimony (all parties)	October 9, 2006
Evidentiary Hearing at PUC at 9:00 a.m.	Oct 30-Nov 7, 2006
Public Hearings, likely in St. Paul and Grand Rapids, perhaps Hoyt Lakes	November 7, 8, 9, 2006
Deadline for Written Public Comment	December 7, 2006
Initial Briefs and Proposed Findings	December 7, 2006
Reply Briefs	December 21, 2006

ALJ Report to PUC	January 23, 2007
6. The following schedule is adopted for Phase 2:	
Discovery on All Phase 2 Issues	January 2, 2007, to hearing
Prehearing Conference on Phase 2	February 1, 2007
Petitioner's Supplemental Testimony	February 12, 2007
Other Parties' Direct Testimony	March 12, 2007
Dispositive Motions (7 days to reply)	April 9, 2007
Rebuttal Testimony (all parties)	April 9, 2007
Surrebuttal Testimony (all parties)	April 23, 2007
Public Hearings	to be determined
Evidentiary Hearing at PUC at 9:00 a.m.	April 30-May 4, 2007
Deadline for Written Public Comment	June 1, 2007
Initial Briefs and Proposed Findings	June 1, 2007
Reply Briefs	June 15, 2007
ALJ Report to PUC	July 13, 2007

Examination of Witnesses

7. Unless the parties agree otherwise, the order of testimony and questioning in the evidentiary hearings shall be: Excelsior Energy, Xcel Energy, other intervenors in order of intervention, and the Department.

8. Witnesses shall be allowed ten minutes to summarize their prefiled testimony. For good cause shown, witnesses will be permitted to respond to any new matters not addressed in prefiled testimony through direct examination by counsel.

9. Parties shall examine and cross-examine witnesses through their attorneys, if they are represented by counsel. Any party not represented by counsel may examine and cross-examine each witness through any one representative chosen by the party.

10. Except for good cause shown, objections by any party relating to the qualifications of a witness or the admissibility of any portion of a witness's prefiled testimony shall be considered waived unless the objecting party states its objection by motion made to the Administrative Law Judge, and serves a copy of such objections on the parties, no later than five business days prior to the commencement of the evidentiary hearings. If an objection is made by a party, the party shall be permitted to lay further foundation for the objection through cross-examination of the witness. Any prefiled testimony that is not objected to shall be admitted during the evidentiary hearings without the necessity of laying foundation for the testimony.

Protective Order

11. A Protective Order will be issued soon.

Service List

12. A revised service list is attached. The following persons have filed Petitions to Intervene and are added temporarily to the Non-Party Participant list pending any objections: Manitoba Hydro, Gerdau Ameristeel US Inc., Marathon Petroleum Company LLC. Christopher Clark's address is corrected. Christopher Anderson is removed from the service list. Annette Henkel, Jerry Larsen, the Gascoyne Project, and Robert H. Schulte are placed on the Non-Party Participant list.

Dated: June 2, 2006

STEVE M. MIHALCHICK
Administrative Law Judge

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

There are numerous sub-issues in this matter involving interpretation of new statutes. Xcel Energy, GNPD, and MCGP argue that many of them should be decided prior to discovery and the filing of testimony because they are new and complex issues, and because there is little need to proceed rapidly. Excelsior Energy argues speed is important to secure financial incentives created by federal law and is implied in the Minnesota statutes.

The legislation has exempted the Mesaba Project from several requirements, which does indicate a directive to proceed with some speed. Many contested cases require interpreting an existing statute in a new situation or interpreting a new statute. The usual procedures are adequate to address that need and there is little reason here to justify adding lengthy proceedings for the purpose of defining terms. Moreover, trying to apply laws in a factual vacuum is difficult and often not productive. Nonetheless, it is fair to require Excelsior Energy to clearly state its position on the legal requirements and the proof it will be presenting first and then to require the other parties to do the same. Thus, the parties will be required to file Statements of the Case with their initial testimony. This should help focus the issues sufficiently for further discovery and preparation for the hearing. Dispositive Motions and Motions in Limine are available if a party believes it would be helpful to the process.

Bifurcating the matter into phases to address the two units is reasonable. It allows the hearing to start more quickly. If Unit I is approved, it can move ahead. But that would not imply that Unit II should be approved as well. From the limited information available, the units appear to be physically identical, so there would be little difference in that evidence and analysis, but several of the other issues may be entirely different for Unit II.

The ALJs will not visit the Indiana project. The evidence as to how the gasification of coal works should be in a form that can be put in the record. Seeing it work and then putting in the ALJ's description of what was seen will not be very helpful. It may be more helpful to for the ALJs to view the sites proposed for the project so that the comments of the MCGP intervenors and the public can be better understood. That may be arranged to occur at the time of the public hearings.

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