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

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of 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

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

Phase 2 of this matter is before Administrative Law Judge Bruce H. Johnson on the record submitted by the parties in lieu of an evidentiary hearing. The following parties have appeared in this matter:

Byron E. Starns, Leonard, Street and Deinard, 150 South Fifth Street, Suite 2300, Minneapolis, MN 55402, and Thomas Osteraas, Excelsior Energy, 11100 Wayzata Boulevard, Suite 350, Minnetonka, MN 55305, on behalf of Excelsior Energy, Inc.
Christopher B. Clark, Assistant General Counsel, 414 Nicollet Mall, Suite 2900, Minneapolis, MN 55401, and Michael Krikava, Briggs and Morgan, P.A., 2200 I.D.S. Center, 80 South 8th Street, Minneapolis, MN 55402, on behalf of Northern States Power Company d/b/a Xcel Energy.
Valerie Means, Assistant Attorney General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101, on behalf of the Department of Commerce.
David R. Moeller, Minnesota Power, 30 West Superior Street, Duluth, MN 55802, on behalf of Minnesota Power.
Carol Overland, Overland Law Office, PO Box 176, Red Wing, MN 55066, on behalf of minncoalgasplant.com (MCGP).
Kevin Reuther, Attorney at Law, Minnesota Center for Environmental Advocacy, 26 East Exchange Street, Suite 206, St. Paul, MN 55101, on behalf of the Minnesota Center for Environmental Advocacy, Izaak Walton League of America—Midwest Office, Wind on the Wires, and Minnesotans for an Energy Efficient Economy (the Environmental Organizations).
Robert S. Lee and Andrew P. Moratzka, Mackall, Crounse & Moore, PLC, 1400 AT&T Tower, 901 Marquette Ave, Minneapolis, MN 55402 on behalf of Xcel Industrial Intervenors.
Todd J. Guerrero and David Sasseville, Lindquist & Vennum, 4200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402-2274 on behalf of Big Stone Unit II Co-Owners.

Richard J. Savelkoul, Felhaber, Larson, Fenlon & Vogt, 444 Cedar Street, Suite 2100, St. Paul, MN 55101 on behalf of the Minnesota Chamber of Commerce.
Eric F. Swanson and David M. Aafedt, Winthrop & Weinstine, P.A., 225 South Sixth St, Suite 3500, Minneapolis, MN 55402 on behalf of Manitoba Hydro.
John E. Drawz, Fredrikson & Byron, P.A., Suite 4000, 200 South Sixth Street, Minneapolis, MN 55402-1425, on behalf of Great Northern Power Development, LLP (Great Northern).

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Minnesota Public Utilities Commission and the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 - 7th Place East, St. Paul, Minnesota 55101 or by electronic filing. The Commission may modify the Date for filing exceptions. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted upon request. Such request must accompany the filed exceptions or reply.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judges' recommendation and that said recommendation has no legal effect unless expressly adopted by the Commission as its final order.

STATEMENT OF THE ISSUE

Whether the Mesaba Project incorporates a "clean energy technology" that "is or is likely to be a least-cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary" and is therefore entitled to supply Xcel with at least thirteen percent of the electric energy that Xcel Energy provides to its retail customers.

The Administrative Law Judge concludes that the Mesaba Project neither is nor is likely to be a least-cost resource to provide or 13% percent of the electric energy that Xcel Energy provides to its retail customers through 2013.

Based upon the record created in this proceeding, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background

Excelsior Energy, Inc., is an independent energy development company based in Minnetonka, Minnesota, that is incorporated under the laws of the State of Minnesota. Excelsior Energy, Inc., and its subsidiary, MEP-I LLC (jointly, Excelsior or Excelsior Energy), is proposing to license, construct, own, and operate the Mesaba Energy Project Units 1 and 2 (collectively, the Mesaba Project or the Project). Mesaba Unit 1 is a solid fuel IGCC power plant located in northeastern Minnesota with an initial capacity installation of 603 MW(net).1 Mesaba Unit 2 is an identical IGCC power plant that Excelsior plans to build adjacent to Unit 1 in a second phase. Excelsior plans to construct Mesaba Unit 2 to approximately the same specifications as Mesaba Unit 1 and operate it in the same way. Mesaba Unit 2 will also have an initial capacity of approximately 603 MW(net).2

The Mesaba Project will be located in the Iron Range, either in Iron Range Township northeast of Grand Rapids, Minnesota or in Hoyt Lakes, Minnesota. Both Mesaba Units 1 & 2 will be located on the same site.3

Northern States Power Company d/b/a Xcel Energy (NSP, Xcel Energy, or Xcel) is engaged primarily in the business of generating, transmitting, and distributing electrical power and energy in the states of Minnesota, Wisconsin, North Dakota and South Dakota. Xcel Energy owns the two nuclear generation facilities currently located in Minnesota.

As of 2002, Xcel Energy provided service to slightly more than half of Minnesota's almost two million non-farm residential electric customers. It served an even higher proportion of Minnesota's commercial electric customers.4 Its Minnesota service areas cover a large portion of the southern half of Minnesota.

A combined cycle (CC) plant uses a gas-fired combustion turbine generator to generate electricity, plus it uses excess heat from the combustion in the combustion turbine to create steam to power a steam turbine generator. This combination is considered highly efficient because it uses more of the heat energy from the burning of the gas. It is now a fairly standard configuration. The gas used is usually natural gas (thus, an NGCC), but other gases can also be used.5

An Integrated Gasification Combined Cycle (IGCC) plant integrates gasification with a combined cycle plant. The gasification process converts coal or other feedstock to a synthesis gas (syngas) comprised primarily of carbon monoxide and hydrogen. The

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1 (P2) XE-2084 at Finding 17.

2 *Id*.; (P2) EE-1310; (P2) XE-2084 at Finding 17.

3 (P2) EE-1020 at p. 10.

4 Minn. Dept. of Commerce, *2002 Utility Data Book*, at 26 and 33. Available at http://www.state.mn.us/mn/externalDocs/Commerce/Utility_Data_Book,_1965-2000__030603120425_UtilityDataBook65thru02.pdf.

5 *ALJ Findings of Fact, Conclusions of Law, and Recommendation*, issued in this matter on April 12, 2006, (Phase 1 Report) at Finding No. 3, included in the Phase 2 record as (P2) XE-2094.

gasification takes place in a gasifier. That is a large vessel capable of containing the high-temperature partial combustion process that breaks down the feedstock and any other ingredients fed into the gasifier, usually water or steam and air or oxygen, into carbon, hydrogen, and oxygen, and then recombines those elements into syngas and other compounds. The syngas is then transported to and burned in a nearby combined cycle gas combustion turbine generator/steam turbine generator combination.6

Mesaba Unit 1 will integrate ConocoPhillips E-Gas gasification technology with advanced F-class combustion turbines. This is an IGCC plant that will include two operating "gasification trains" or "gasification islands" (a gasifier and its supporting apparatus), a standby gasification train, two combustion turbines, and a single steam turbine. The spare gasification train is included in order to increase the percent of the time the Mesaba Project is able to operate, its "availability," to about 92 percent, a very high number. It also provides a backup and the possibility of creating extra syngas that could be sold as a fuel or chemical feedstock. The two or three gasifier trains will feed syngas to the "combined cycle," or "power island," section. There, the syngas will be burned in the two gas combustion turbine generators and the excess heat from those gas turbines will be used to heat water to steam to drive the single steam turbine generator. High pressure steam produced in the gasification trains will also be integrated into the combined cycle, again making efficient use of heat energy that would otherwise be wasted.7

Gasifiers can be designed to process a wide variety of hydrocarbon fuels, including biomass. The gasifiers for the Project have been designed to operate on subbituminous Powder River Basin (PRB) coal, but will also have the flexibility to receive petroleum coke or bituminous coal fuel as market conditions dictate. The expected net plant output is 603 MW when operating on PRB coal fuel. The net heat rate (a measure power plant thermal efficiency) for the plant when operating on PRB coal is estimated at 9390 btu/kWh on a higher heating value basis. The heat rate will be substantially lower with petroleum coke or bituminous coal fuels, or on natural gas.8

The Mesaba Project can also run on natural gas, bypassing the gasifiers and operating as a typical NGCC plant. The Mesaba Project will be operated in this mode for startup, as back-up when required, and for significant time periods during at least its first three years of operation.9

During the Mesaba Project's initial three-year ramp-up period, the Project is likely to consume unusually high amounts of natural gas on the theory that higher fuel costs during the shakedown period will facilitate major cost savings later on, when the facility will run on low-cost fuel.10

Relevant Statutes

The Legislature enacted both the Clean Energy Technology statute, Minn. Stat. § 216B.1693, and the Innovative Energy Project statute, Minn. Stat. § 216B.1694, in its

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6 (P2) XE 2094 at Finding No. 4.
7 (P2) XE 2094 at Finding No. 7.
8 (P2) XE 2094 at Finding No. 8.
9 (P2) XE 2094 at Finding No. 9.
10 Commission's August 30, 2007, Order at p. 18.

2003 Special Legislative Session as part of the 2003 Omnibus Energy Bill.[11] Minn. Stat. § 216B.1693 provides:

216B.1693 CLEAN ENERGY TECHNOLOGY.

(a) If the commission finds that a Clean Energy Technology is or is likely to be a least-cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary, the utility that owns a nuclear generating facility shall supply at least two percent of the electric energy provided to retail customers from Clean Energy Technology.

(b) Electric energy required by this section shall be supplied by the Innovative Energy Project defined in section 216B.1694, subdivision 1, unless the commission finds doing so contrary to the public interest.

(c) For purposes of this section, "Clean Energy Technology" means a technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies.

(d) This section expires January 1, 2012.

Minn. Stat. § 216B.1694, provides in relevant part:

216B.1694 INNOVATIVE ENERGY PROJECT.

Subdivision 1. **Definition**. For the purposes of this section, the term "innovative energy project" means a proposed energy-generation facility or group of facilities which may be located on up to three sites:

(1) that makes use of an innovative generation technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies;

(2) that the project developer or owner certifies is a project capable of offering a long-term supply contract at a hedged, predictable cost; and

(3) that is designated by the commissioner of the Iron Range Resources and Rehabilitation Board as a project that is located in the taconite tax relief area on a site that has substantial real property with adequate infrastructure to support new or expanded development and that has received prior financial and other support from the board.

In its 2007 regular session, the Legislature enacted an amendment to the Renewable Energy Objectives statute, Minn. Stat. § 216B.1691,[12] and also enacted the Global Warning Mitigation Act, Minn. Stat. §§ 216.01H *et seq*.[13]

Minn. Stat. § 216B.1691, as amended, provides in pertinent part:

> **216B.1691 RENEWABLE ENERGY OBJECTIVES.**
>
> Subdivision 1. **Definitions.** (a) Unless otherwise specified in law, "eligible energy technology" means an energy technology that: generates electricity from the following renewable energy sources: (1) solar; (2) wind; (3) hydroelectric with a capacity of less than 100 megawatts; (4) hydrogen, provided that after January 1, 2010, the hydrogen must be generated from

11 Act of May 29, 2003, ch. 11, art. 4, 2003 Minn. Laws 1st Spec. Sess. 1661.

12 Act of February 28, 2007, 2007 Minn. Laws ch. 3, § 1.

13 Act of May 25, 2007, 2007 Minn. Laws, ch. 136, art. 5.

the resources listed in this clause; or (5) biomass, which includes, without limitation, landfill gas, an anaerobic digester system, and an energy recovery facility used to capture the heat value of mixed municipal solid waste or refuse-derived fuel from mixed municipal solid waste as a primary fuel.

(b) "Electric utility" means a public utility providing electric service, a generation and transmission cooperative electric association, a municipal power agency, or a power district.

(c) "Total retail electric sales" means the kilowatt-hours of electricity sold in a year by an electric utility to retail customers of the electric utility or to a distribution utility for distribution to the retail customers of the distribution utility.

* * *

Subd. 2a. **Eligible energy technology standard.**

* * *

(b) An electric utility that owned a nuclear generating facility as of January 1, 2007, must meet the requirements of this paragraph rather than paragraph (a). An electric utility subject to this paragraph must generate or procure sufficient electricity generated by an eligible energy technology to provide its retail customers in Minnesota or the retail customer of a distribution utility to which the electric utility provides wholesale electric service so that at least the following percentages of the electric utility's total retail electric sales to retail customers in Minnesota is generated by eligible energy technologies by the end of the year indicated:

(1)	2010	15 percent
(2)	2012	18 percent
(3)	2016	25 percent
(4)	2020	30 percent.

Of the 30 percent in 2020, at least 25 percent must be generated by wind energy conversion systems and the remaining five percent by other eligible energy technology.

Minn. Stat. § 216H.03, subd. 3 provides in pertinent part:

216H.03 FAILURE TO ADOPT GREENHOUSE GAS CONTROL PLAN.

Subdivision 1. **Definition; new large energy facility.** For the purpose of this section, "new large energy facility" means a large energy facility, as defined insection 216B.2421, subdivision 2, clause (1), that is not in operation as of January 1, 2007, but does not include a facility that (1) uses natural gas as a primary fuel, (2) is designed to provide peaking, intermediate, emergency backup, or contingency services, (3) uses a simple cycle or combined cycle turbine technology, and (4) is capable of achieving full load operations within 45 minutes of startup for a simple

cycle facility, or is capable of achieving minimum load operations within 185 minutes of startup for a combined cycle facility.

Subd. 2. **Definition; statewide power sector carbon dioxide emissions.** For the purpose of this section, "statewide power sector carbon dioxide emissions" means the total annual emissions of carbon dioxide from the generation of electricity within the state and all emissions of carbon dioxide from the generation of electricity imported from outside the state and consumed in Minnesota. Emissions of carbon dioxide associated with transmission and distribution line losses are included in this definition. Carbon dioxide that is injected into geological formations to prevent its release to the atmosphere in compliance with applicable laws, and emissions of carbon dioxide associated with the combustion of biomass, as defined in section 216B.2411, subdivision 2, paragraph (c), clauses (1) to (4), are not counted as contributing to statewide power sector carbon dioxide emissions.

Subd. 3. **Long-term increased emissions from power plants prohibited.** Unless preempted by federal law, until a comprehensive and enforceable state law or rule pertaining to greenhouse gases that directly limits and substantially reduces, over time, statewide power sector carbon dioxide emissions is enacted and in effect, and except as allowed in subdivisions 4 to 7, on and after August 1, 2009, no person shall:

(1) construct within the state a new large energy facility that would contribute to statewide power sector carbon dioxide emissions;

(2) import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or

(3) enter into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions. For purposes of this section, a long-term power purchase agreement means an agreement to purchase 50 megawatts of capacity or more for a term exceeding five years.

* * *

Subd. 7. **Other exemptions.** The prohibitions in subdivision 3 do not apply to:

(1) a new large energy facility under consideration by the Public Utilities Commission pursuant to proposals or applications filed with the Public Utilities Commission before April 1, 2007, or to any power purchase agreement related to a facility described in this clause. The exclusion of pending proposals and applications from the prohibitions in subdivision 3 does not limit the applicability of any other law and is not an expression of legislative intent regarding whether any pending proposal or application should be approved or denied; * * *

Procedural History

On December 27, 2005, Excelsior filed a Petition asking the Commission to open a contested case proceeding, and in so doing, to require the ALJs to recommend findings and conclusions on the following general issues:14

a. Whether the Commission should approve, amend, or modify the terms and conditions of a proposed power purchase agreement that Excelsior had submitted to Xcel Energy under Minn. Stat. § 216B.1694;

b. Whether the Commission should determine that the coal-fueled Integrated Gasification Combined Cycle ("IGCC") power plant that Excelsior plans to construct in northern Minnesota is, or is likely to be, a least-cost resource, obligating Xcel Energy to use the plant's generation for at least two percent of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693; and

c. Whether the Commission should determine that, under the terms of Minn. Stat. § 216B.1693, at least 13% of the energy supplied to Xcel Energy's retail customers should come from the IGCC plant by 2013.

The Commission considered Excelsior's petition and procedural comments on April 6, 2006, and on April 25, 2006, issued an Order finding that it had jurisdiction over Excelsior's petition under Minn. Stat. §§ 216B.1693 and 216B.1694 and referring the matter to the Office of Administrative Hearings for a contested case proceeding. In that Order, the Commission delineated the issues to be addressed in the contested case proceeding—namely whether the Commission should:

1) approve, 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 Combined 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 two percent of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693; and

14 Excelsior's Petition requested the Commission to require the ALJs to recommend findings and conclusions on nine specific findings, which the Commission subsequently aggregated into the following three. *See* (P2) EE-1002 and Commission Order of April 25, 2006, in MPUC Docket No. E-6472/M-05-1993 (Commission Order of April 25, 2006) at p. 1.

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 2013.15

The Second Prehearing Order entered on June 2, 2006, acknowledged that the three issues the Commission had identified were the ultimate issues in this proceeding. That Order bifurcated this matter into two phases, with Phase 1 addressing the Commission's first two issues and Phase 2 addressing only the third. It also established schedules for both Phase 1 and Phase 2.

In the Sixth Prehearing Order dated August 9, 2006, the ALJs modified the schedules for both Phase 1 and Phase 2, establishing the following schedule for Phase 2:

Discovery on All Phase 2 Issues	January 22, 2007, to hearing
Prehearing Conference on Phase 2	February 23, 2007
Petitioner's Supplemental Testimony	March 6, 2007
Other Parties' Direct Testimony	April 3, 2007
Dispositive Motions (7 days to reply)	May 1, 2007
Rebuttal Testimony (all parties)	May 1, 2007
Surrebuttal Testimony (all parties)	May 14, 2007
Public Hearings	to be determined
Evidentiary Hearing at PUC at 9:00 a.m.	May 21-25, 2007
Deadline for Written Public Comment	June 22, 2007
Initial Briefs and Proposed Findings	June 22, 2007
Reply Briefs	July 6, 2007
ALJ Report to PUC	August 3, 2007

At a November 16, 2006, prehearing conference, the parties stipulated to the admission of the pre-filed testimony and waived cross-examination of all witnesses for the evidentiary hearing in Phase 1, which had been scheduled to commence on November 20, 2006.

Public hearings were held on December 18, 2006, in St. Paul, on December 19, 2006, in Hoyt Lakes, and on December 20, 2006, in Taconite.

The hearing record for Phase 1 closed on January 19, 2007, and on April 12, 2007, the ALJs issued findings of fact, conclusions of law, and a recommendation to the Commission regarding the two issues that had been addressed in Phase 1.

On April 25, 2007, Xcel filed a Motion and Memorandum Regarding Phase 2, seeking to stay Phase 2 proceedings until after the Commission entered a final order on Phase 1. Xcel also requested that if the ALJ16 denied the stay, denial be certified to the

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15 Commission Order of April 25, 2006 at p. 1.

16 Administrative Law Judges Steve M. Mihalchick and Bruce H. Johnson jointly had presided over Phase 1. However, by letter dated May 3, 2007, the ALJs advised parties that Judge Johnson alone would be presiding over Phase 2 and

Commission for its consideration pursuant to Minn. R. 1400.7600. On May 8 and 9, 2007, the Chamber and MCGP responded by concurring with Xcel Energy's motion, and Excelsior responded by objecting to the motion.

By letter dated May 3, 2007, the ALJs notified the parties that they were dividing responsibility for pending contested cases involving the Mesaba Project, with the undersigned ALJ presiding over these Phase 2 proceedings and ALJ Mihalchick presiding over the pending siting and routing proceeding associated with the Mesaba Project.

On May 10, 2007, the undersigned ALJ entered an Order denying Xcel's motion to stay and, if not, for certification of that motion to the Commission. The ALJ concluded that a number of factors tended to support going ahead with a Phase 2 evidentiary hearing. First, four key issues of law and fact bearing on Phase 2 proceedings had been addressed by the ALJs in the Phase 1 report and had been presented to the Commission for adjudication: (1) whether the Mesaba Project qualifies as "clean energy technology"; (2) whether the Mesaba Project "is or is likely to be a least-cost resource"; (3) whether the Mesaba Project qualifies as a "innovative energy project"; and (4) if all of that is so, whether having the Mesaba Project supply at least two percent of the electric energy provided to Xcel's retail customers would be contrary to the public interest. The ALJ ruled that only question remaining for Phase 2 was a very narrow one—namely, if the Commission's Phase 1 decision was that Excelsior's Mesaba Project met all four of those criteria, whether the Commission should direct that the Mesaba Project provide thirteen percent, rather than two percent, of the electric energy provided to Xcel's retail customers. The ALJ also denied Xcel's request for certification to Commission, citing the little time members had to become informed and deliberate about the underlying issues. Finally, the ALJ scheduled a prehearing conference for 3:00 p.m. on Tuesday, May 15, 2007, to discuss matters relating to the impending evidentiary hearing.

At the May 15, 2007, prehearing conference, the parties stipulated to the admission of the pre-filed testimony and exhibits from the Phase 1 record, and waived cross-examination of witnesses in a Phase 2 evidentiary hearing, which had been scheduled to begin on May 21, 2007.17 During that prehearing conference, Excelsior also indicated that it would be filing an Offer of Proof.18 The ALJ then made some modifications of the Phase 2 schedule that had been established in the Sixth Prehearing Order. The Phase 2 evidentiary record would remain open for documentary evidence until June 4, 2007.19 Initial post-hearing briefs any offers of proof would be due on June 22, 2007; reply briefs would be due on July 16, 2007, and the ALJ's Phase 2 report would be issued on or before August 15, 2007.20

On June 5, 2007, Excelsior transmitted to the ALJ the documents that the parties had agreed would comprise the Phase 2 hearing record.

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that Judge Mihalchick would alone be presiding over the associated site and route permit proceedings.

17 *See* Transcript of May 14, 2007, prehearing conference at pp. 14-19.

18 *Id*.

19 *Id*. at p. 22.

20 *Id*. at pp. 22-25.

On June 22, 2007, Excelsior, Xcel, Minnesota Power, MGCP, and the Department of Commerce filed initial post-hearing briefs; Excelsior and Xcel also filed proposed findings of fact and conclusions, and Excelsior filed an Offer of Proof Regarding Evidence Excluded from the Phase 2 Record, consisting of the written testimony of Douglas H. Cortez and Andrew D. Weissman.

By letter dated June 26, 2007, the ALJ incorporated into the Phase 2 hearing record all of the public comments and public exhibits that had been received into the Phase 1 record.

On July 16, 2007, Excelsior, Xcel, and the Department of Commerce filed post-hearing reply briefs, and the OAH hearing record for Phase 2 closed.

On August 30, 2007, the Commission issued Findings, Conclusions and an Order addressing the issue of whether it should approve, amend, or modify the terms and conditions of a proposed power purchase agreement that Excelsior has submitted to Xcel Energy under Minn. Stat. § 216B.1694.21 Specifically, the Commission found and concluded:

d. That the Mesaba Project is an Innovative Energy Project under Minn. Stat. § 216B.1694;22

e. That the terms and conditions of the proposed power purchase agreement submitted by Excelsior are not in the public interest;23

f. That the terms and conditions of the proposed contract result in unreasonably high prices, which translate into unreasonably high rates;24

g. That the terms and conditions of the proposed contract expose Xcel and its ratepayers to unreasonable operational risks;25

h. That the terms and conditions of the proposed contract expose Xcel and its ratepayers to unreasonable financial risks;26

i. That the terms and conditions of the proposed contract could have collateral negative consequences for Xcel's financial health;27 and

j. That the potential benefits of IGCC technology reflected in the considerations set forth in Minn. Stat. § 216B.1694, subd. 2 (a) (7) do not offset the high price and significant ratepayer risks of the proposed contract's terms and conditions.28

However, the Commission directed Excelsior and Xcel to continue negotiating the terms of a potential PPA, with the Department's assistance.

In the Commission's Phase 1 Order, it did not specifically address issues relating to any potential power supply entitlements available to Excelsior or corresponding power purchase obligations of Xcel under Minn. Stat. § 216B.1693 (or the CET Statute).

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21 Commission's Order of August 30, 2007, in MPUC Docket No. E-6472/M-05-1993 (Commission's August 30, 2007, Order).

22 Commission's August 30, 2007, Order at pp. 9-13.

23 Commission's August 30, 2007, Order at pp. 13-15.

24 *Id* at pp. 15-17.

25 *Id*. at pp.17-19.

26 *Id*. at p. 19.

27 *Id*. at p. 20.

28 *Id*. at pp. 20-23.

Mesaba Project's Qualification as Clean Air Technology

Minn. Stat. § 216B.1693(a) directs the Commission to determine whether "c*lean energy technology*" (also Clean Energy Technology or CET) is "likely to be a least-cost resource." If that is the case, that paragraph requires Xcel to "supply at least two percent of the electric energy provided to retail customers from clean energy technology." Minn. Stat. § 216B.1693(c) goes on to define "Clean Energy Technology" as "a technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies." The ALJs previously concluded that statutory test of "clean energy technology" is virtually the same as the three-part test of "innovative energy project" (also Innovative Energy Project or IEP) in Minn. Stat. § 216B.1694, subd. 1(1) and that both provisions have the same meaning.29 Since the Commission has found that the Mesaba Project is an Innovative Energy Project under Minn. Stat. § 216B.1694;30 the Project also necessarily qualifies as a Clean Energy Technology under Minn. Stat. § 216B.1693(c).

Minn. Stat. § 216B.1693(d) provides that "[t] his section expires January 1, 2012," after which the legal entitlements and obligations of the CET Statute no longer have the force and effect of law."31

Project-Specific Nature of the CET Statute

It is Excelsior's position that Xcel must purchase power from an IGCC power producer if IGCC-produced power in general can be shown to be a least-cost resource for Xcel. However, Minn. Stat. § 216B.1693(b) makes the electric energy supply entitlement in paragraph (a) project-specific by providing that the electric energy *must* be supplied by the Innovative Energy Project described in Minn. Stat. § 216B.1694, subd. 1, unless the Commission finds doing so contrary to the public interest.

Among potential IGCC power producers, only the Mesaba Project qualifies as an IEP. Therefore, if the Commission finds that it is not contrary to the public interest for the Project to supply the power described in Minn. Stat. § 216B.1693(a), the entitlement to supply that power becomes exclusive and specific to the Mesaba Project.32

On the other hand, if the Commission should find that it is contrary to the public interest for the Mesaba Project to supply that power, the CET Statute then becomes non-specific and its entitlements theoretically become available to other qualified IGCC power producers. However, in that event, Excelsior would no longer have standing to maintain its Phase 2 petition because it would no longer have the potential "injury in fact" required to continue this proceeding.33

Xcel's Retail Electric Energy Requirements

The testimony of Elizabeth Engleking establishes that Xcel will be providing 35,440,000 MWh of energy to its Minnesota retail customers in 2012, that 97.5 MW of generation

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29 (P2) XE-2094 at p. 74.

30 Commission's August 30, 2007, Order at pp. 9-13.

31 *See* discussion in attached Memorandum at pp. 27-29.

32 *See* further discussion in attached Memorandum at pp. 30-31.

33 *See* further discussion in attached Memorandum at p. 32.

capacity will be required to meet 2% of that retail energy demand, and that 603 MW will be required to meet approximately 13% of that demand.34

In the following year 2013, Xcel will be providing 36,040,000 MWh of energy to its Minnesota retail customers, and 644 MW of generation capacity will be required to meet 13% of that retail energy demand.35 Mesaba Unit 1's net generation capacity alone would therefore be insufficient to provide 13% of the energy Xcel expects to supply to its retail customers in 2013.36

The total net generation capacity of both Mesaba Units 1 and 2 is approximately 1200 MW, and that total net generation capacity would be sufficient to supply 24% of the energy that Xcel expects to provide to retail customers in 2013.37

The Mesaba Project's Costs

The reasonableness of the cost of the energy supplied by the Project can be ascertained by comparing those costs to alternative baseload facilities of similar sizes. If the Project's cost of electricity is lower or similar to the prices of energy and capacity of the alternative baseload facilities one can conclude that the Project is a least-cost resource are reasonable.38

Department witness Eilon Amit compared the Project's cost of electricity with those of Big Stone II, Comanche Unit 3 (an Xcel Energy plant in Colorado), and Sherco 4.39 Dr. Amit calculated the average annual and levelized costs of electricity for Excelsior's two alternative sites.

Table 1: Cost (Price) Comparison Including Emission Costs, Excluding Transmission Costs

Alternative	Average Annual Price ($/MWh)	Levelized Price ($/MWh)
Excelsior		
West Site (603 MW)	$104.33	$ 96.04
East Site (598 MW)	$114.25	$104.91
Big Stone II Supercritical	$ 81.91	$ 73.02
Sherco 4 Supercritical	$ 74.90	$ 72.5440

Dr. Amit also calculated the cost of electricity for a 450 MW output at both sites. Those costs are about 25 percent higher than the costs shown for full capacity output at the two possible sites.

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34 More precisely 12.4% of that demand. XE-2082 at pp. 6-7.

35 *Id*.

36 *Id*.

37 *Id*. at p. 8; *see also* Findings No. 1.

38 Adapted from Phase 1 Finding No. 179. (P2) 2094 at Finding No. 179; *see also* (P2) DOC 3000 at 21.

39 (P2) DOC 3000 at 21-27; (P2) DOC 3018 at 3; (P2) DOC 3020.

40 Adapted from Adapted from Phase 1 Finding No. 180. (P2) 2094 at Finding No. 180; *see also* (P2) DOC 3023 at 3. The Comanche 3 estimated price is trade secret and has not been restated here. It is available in the nonpublic versions of the cited exhibits. It is not greater than the Big Stone II price.

Before the MISO had determined what transmission upgrades would be required to connect the Project to the transmission grid, Dr. Amit made following estimates of the PPA's costs including transmission:

Table 1: Cost (Price) Comparison Including Emission and Transmission Costs

Alternatives	Levelized Price With Emissions, No Transmission Cost $/MWh	Levelized Transmission $/MWh	Total Levelized Costs $/MWh
Excelsior Energy			
West Site (603 MW)	96.04	9.21	105.25
East Site (598 MW)	104.91	9.21	114.12
Big Stone II	73.02	2.74	75.76
Sherco 4	72.54	2.79	75.3341

Subsequently, Excelsior Energy was allowed to file a determination from the MISO that fewer transmission upgrades would be necessary to connect either site to the transmission grid than originally anticipated, reducing the estimated cost from $180 million to $50 million, in 2006 dollars. Based upon this new information, Dr. Amit revised his levelized transmission cost figures from $9.21/MWh down to $2.58/MWh. That change reduces his total levelized cost estimates for the West and East Sites. It would cause Table 1 to be revised as follows:

Table 2: Cost (Price) Comparison Including Emission and Transmission Costs

Alternatives	Levelized Price With Emissions, No Transmission Cost $/MWh	Levelized Transmission $/MWh	Total Levelized Costs $/MWh
Excelsior Energy			
West Site (603 MW)	96.04	2.58	98.62
East Site (598 MW)	104.91	2.58	107.49
Big Stone II	73.02	2.74	75.76
Sherco 4	72.54	2.79	75.3342

The levelized costs calculated by Dr. Amit provide a reasonable basis for comparison. They demonstrate that power produced by Mesaba Unit 1 at the Project's preferred West Site would cost Xcel Energy and its ratepayers about 30 percent more than capacity and electricity from other comparable sources.[43]

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41 Adapted from Adapted from Phase 1 Finding No. 181. (P2) 2094 at Finding No. 181; *see also* (P2) DOC 3018 at 3, corrected in (P2) DOC 3024 at 1.

42 Adapted from Adapted from Phase 1 Finding No. 182. (P2) 2094 at Finding No. 182.

43 Commission's August 30, 2007, Order at p. 16.

Impact of the GWMA on Least Cost Analysis

In its 2007 session, the Legislature enacted the Global Warming Mitigation Act (GWMA). A goal of the GWMA is to reduce greenhouse gas emissions by at least 15% below 2005 levels by 2015.44 There is no incremental goal to achieve a specific reduction on or before January 1, 2012, or in 2013.

Among other things, the GWMA imposes a temporary moratorium on the construction of new coal-fired generating plants in Minnesota. That moratorium also extends to the importation of electric energy from out-of-state coal-fired plants that would "contribute to statewide power sector carbon dioxide emissions."45 Both the Mesaba Project and the proposed Bigstone II SCPC plant in South Dakota are specifically exempted from the moratorium. Also exempt from the moratorium are facilities using natural gas as a primary fuel.46

Elizabeth Engleking offered testimony in Phase 2 analyzing the cost impact of Mesaba Units 1 and 2 on Xcel generation system. Her analyses compared Xcel's present value revenue requirements (PVRR) with Mesaba Units 1 and 2 included as resources in Xcel's system in comparison with the revenue requirements if Xcel relies on various other available resources to meet its incremental demand for power through 2013. None of those other available resources were additional natural gas-fired power resources. Rather, her testimony established that Xcel can meet any incremental baseload demand between now and January 1, 2012, or 2013 with energy produced from a combination of renewable and hydro sources at a cost that is between $2.3 and $2.5 billion less than any power the Project could supply even if it were able to produce power during that period.47 The new Minn. Stat. § 216H.03 will therefore not require Xcel to obtain power from Excelsior's Mesaba Project or from additional natural gas-fired resources anytime in the near future.

Contrary to Excelsior's assertion, the exclusion of natural gas-fired plants from the GWMA's temporary moratorium does not "virtually [guarantee] that almost all of the incremental energy demand growth that cannot be met with renewable energy will have to be met with yet more natural gas-fired generation."48 Nor will the GWMA increase within the foreseeable future the cost of electricity produced by Xcel's gas-fired generating plants to such an extent that the Mesaba Project becomes a least-cost resource by comparison.

Enactment of the GWMA will not cause the price of natural gas to increase between now and 2012 or 2013 to the point where the Mesaba Project is likely to be a least-cost resource in comparison with the power that Xcel obtains from its existing natural gas-fired facilities. Nor is that likely to occur in the more distant future.

The Phase 2 record contains no reliable evidence establishing that enactment of the GWMA will drive Xcel's cost of operating its own natural gas-fired plants to such a high level that power supplied by the Mesaba Project is likely to be a least-cost resource by comparison.

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44 Minn. Stat. § 216H.03, subd. 2a(b), 2007 Minn. Laws, ch. 136, Art. 5, § 2.

45 Minn. Stat. § 216H.03, subd. 3, 2007 Minn. Laws, ch. 136, Art. 5, § 3.

46 *See* further discussion in attached Memorandum at p. 34.

47 (P2) XE-2082; (P2) XE-2083.

48 Excelsior's Initial Brief at p. 4.

Even if the Commission looks somewhat beyond 2012 or 2013, the Project's IGCC-produced power is not likely to be a least-cost resource in comparison with power produced by natural gas-fired plants.

Impact of the Project's Particulate Emissions on Least Cost Analysis

In their Phase 1 report, the ALJs found that "[t]he particulate matter emissions of "other traditional solid fuel baseload technologies (ranging from 18% to 73%) are generally higher than *the Project's* estimated particulate emissions."49 They also found that "[i]n comparison with traditional solid fuel baseload technologies, the Project's emissions of … particulates will be significantly reduced."50 [Emphasis supplied.]

In Phase 2, Excelsior seeks to quantify reduced particulate matter as a monetary benefit of IGCC power or as a corresponding cost of traditional solid fuel baseload technologies. Citing a report from its contractor, ICF Consulting (ICF),51 Excelsior asserts that the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions of an SCPC plant are approximately $105 million per year greater than those associated *with IGCC technology*, and that that fact alone makes the Project more likely to be a least-cost resource in comparison with SCPC coal plants.

ICF Consulting's report does not purport to compare the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions of an SCPC plant with those associated with the Mesaba Project. The fact that the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions of an SCPC plant may be approximately $105 million per year greater than those associated *with IGCC technology in general* does not establish that the Mesaba Project more likely to be a least-cost resource in comparison with SCPC coal plants.

On the other hand, Dr. Amit reached a contrary conclusion in Phase 1 testimony that compared the Mesaba Project itself with "three actual supercritical plants in different stages of construction or design by Minnesota utilities."52 His comparisons included the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions, and he concluded that, when one accounts for emission costs, including those attributable to particulate matter, by using the externality values set by the Commission, power supplied by the Mesaba Project is not a least-cost resource.53 Dr. Amit's Project-specific comparisons are more persuasive than the generalized, hypothetical comparisons in the ICF Consulting report.

Impact of Carbon Capture and Sequestration on Least Cost Analysis

The MPCA compared the Project's carbon dioxide emissions with three other existing facilities and with EPA's three types of future "generic" plants. Again, the MPCA presented its comparisons as percentages by which the other actual or hypothetic facilities varied from the Project's emissions. The MPCA employed pounds of CO_2 per million BTUs as the unit of comparison:

Plant	CO_2
Wabash	-9.5%

49 Phase 1 Report Finding No. 72. (P2) XE-2094 at Finding No. 72.
50 Phase 1 Report Finding No. 74. (P2) XE-2094 at Finding No. 74.
51 (P2) EE 1011.
52 Commission's Phase 1 Order at p. 16.
53 (P2) DOC 3017 and (P2) DOC 3023.

Existing PC with BACT controls	+10.3%
Desert Rock SCPC	+2.8%
SWEPCO Hempstead USC PC	+0.5%
EPA "generic" subbituminous SC	-4.2%
EPA "generic" subbituminous IGCC	-17.0%
EPA "generic" subbituminous USC	-13.3%54

The MPCA's analysis establishes that carbon dioxide emissions from other technologies are expected to be lower than the expected carbon dioxide emissions from the Project.55

Excelsior Energy plans to configure Units I and II to allow for the installation of additional equipment that can capture up to 30% of the potential carbon in its selected feedstock possibly as early as 2014, with the possibility of adding a longer term option later for up to 90% removal, if and when DOE demonstrates such the feasibility of such removal. However, it would install the additional equipment only if it is required by law. Excelsior Energy would expect the Final PPA to be amended to allow it to be compensated at a reasonable cost of capital for its investments and to be made whole on all other costs associated with the its carbon capture and sequestration plan (CCS Plan).56

Based on information provided by Excelsior and analyzed by the Department, the cost of equipment needed to capture some CO_2 at the Project is approximately $472.3 million in 2011 dollars. The cost of a pipeline necessary to transport captured CO_2 from the plant to depleted petroleum wells in Alberta, Canada, where it could possibly be used to enhance additional oil production and be stored, is approximately $635.4 million in 2011 dollars. Therefore, the total estimated cost to capture and sequester CO_2 would be $1.1077 billion in 2011 dollars.57 From that data, Dr. Amit estimated the levelized cost of the additional equipment needed to capture CO_2 and the pipeline to transport it to the nearest site for geological storage at an additional $50.02 MWh for either of the proposed sites.

As Dr. Amit states, "After accounting for transmission costs, AFUDC costs and sequestration costs, the least cost of Excelsior plants (West Site 603 MW) is significantly more expensive than any of the alternative baseload plants."58 If anything, the cost estimates for the Project are low; they will quite likely exceed the cost of comparable sources by even more than 30 percent.59 Dr. Amit compared the Project's costs with those of the Bigstone II Project, which is also exempt from the GWMA moratorium. He concluded that the Project's levelized price per MWh would be significantly higher than that of the Bigstone II project.60

An additional cost associated with carbon capture is the reduced operational efficiency of the Project. Excelsior Energy suggests that capture of 30% of the carbon produced

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54 Phase 1 Report Finding No. 145. (P2) XE-2094 at Finding No. 145.
55 Phase 1 Report Finding No. 145. (P2) XE-2094 at Finding No. 146.
56 (P2) EE 1067 at 1-2.
57 (P2) DOC 3014 at 21.
58 (P2) DOC 3018 at 3.
59 Phase 1 Finding No. 186; (P2) 2094 at Finding No. 186.
60 Phase 1 Findings Nos. 179-183; (P2) 2094 at Findings Nos. 179-183.

by the Project will result in at least a ten percent loss of plant efficiency.61 Thus, the revised cost of the Project with carbon capture ability would be divided over significantly lower capacity and output, resulting in significantly greater payments by Xcel Energy and its ratepayers for the energy provided.

Xcel's expert witness, Ms. Engleking, concluded that the present value revenue requirement (PVRR) for Xcel's generation system would be $2.5 billion greater using the Project as a resource than with the alternative energy resources in Xcel's current, approved resource plan.62 Ms. Engleking's analysis also factored in carbon emissions as an externality. Thus, the Project's IGCC technology's ability to capture carbon will not contribute significantly to the likelihood that it will be a least-cost resource in comparison with conventional coal-fired technology, particularly between now and 2012 or 2013.

Excelsior concedes that its estimates of the cost of carbon capture are based on uncertain assumptions; and they do not account for the 70% of the Project's CO_2 emissions that will be released into the atmosphere.63 Additionally, the nearest locations that are geologically favorable for sequestration of captured carbon are in north central North Dakota, southwestern Manitoba, and southeastern Alberta, and pipelines would have to be built to pump the carbon dioxide to those locations for sequestration. As a result, and because the Project currently has only the *potential* to capture and sequester carbon, the estimates of Dr. Amit and Ms. Engleking of the costs of emissions, including carbon, as externalities represent reliable approaches to comparing the cost of Project's carbon emissions to those of conventional coal plants. All the Project now has is the unrealized potential to capture and sequester carbon. Excelsior's own expert witness, Mr. Cortez, indicated that the favorable financial implications of the Project's carbon capture potential are likely to be most meaningful only when viewed over the very long term of the Project's life cycle— during a time frame when the CET Statute will no longer place Xcel under any legal obligation to purchase the a percentage of its retail power from the Excelsior or any other IGCC power producer.64

Mesaba Project Eligibility to Supply 13% of Xcel's Retail Load

Excelsior earlier proposed that 450 MW of its proposed PPA be reviewed under Minn. Stat.§ 216B.1694. It proposed that an additional 153 MW (West Range Site) or 148 MW (East Range Site) be reviewed and approved pursuant to Minn. Stat. § 216B.1693, the Clean Energy Technology Statute.65 It is most appropriate to determine cost and pricing on a per Megawatt-hour basis. In order to do so, the costs of the Project should be determined on the total cost and total output of the Project.

If the Commission were to find that the Project qualifies for the statutory minimum of two percent, the Legislature contemplated that the Commission would have the discretion to

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61 (P2) XE-2094 at Findings Nos. 180-182; (P2) EE 1091 at 20; MCGP 5000 at 8.

62 (P2) EX-2082 at 2.

63 (P2) EE-1068.

64 (P2) EE-1091 at p. 16.

65 Order on Motion for Summary Disposition of Xcel Industrial Intervenors at 7.

raise the 2 percent floor to a higher percentage66 However, to raise the percentage from 2% to 13%, the Commission would first have to conclude that the Project was likely to be a least-cost for 13% of Xcel's retail energy needs and also find that supplying 13% of Xcel's retail energy is not contrary to the public interest.67

The Commission found and concluded in its Phase 1 Order that the power Excelsior proposes to supply under the PPA using Mesaba Unit 1 would currently cost approximately 30% more than power from comparable facilities over the life of the PPA.68 Therefore, using power supplied by its Unit 1, the Mesaba Project and its technology is not likely to be a least-cost resource for Xcel within the meaning of Minn. Stat. § 216B.1693.

With the exception of Xcel, the parties, most notably Excelsior and the Department, relied in Phase 2 on evidence they submitted in Phase 1 regarding the cost of energy produced by the Project,69 and in the absence of any evidence to the contrary the "inside battery limits costs" of Mesaba Units 1 and 2 are approximately the same. The 603 MW(net) capacity of either Mesaba Unit 1 or Unit 2 would be sufficient to supply approximately 12.4% of the power required by Xcel's Minnesota retail customers in 2012.70 Since the Commission has not approved a PPA for 450 MW, Excelsior would only need one Mesaba Unit to supply approximately 12.4% of Xcel's 2012 retail load. The cost of that single unit would also have to include "the costs of ancillary services and other generation and transmission upgrades necessary" in addition to the Unit's "inside battery limits costs."71

In their Phase 1 report, the ALJs found that the Mesaba Project is not likely to be a least-cost resource to provide 2% of the electric energy that Xcel provides to its retail customers.72 The issue in Phase 2 is whether the Commission should exercise its statutory discretion to raise that percentage from 2% to 13%. No event has occurred since the Phase 1 Report to make it more likely that the Project will be a least-cost resource for any percentage of Xcel's retail load. Rather, the evidence in the Phase 2 record tends to establish that it is even less likely that the Project is a least-cost resource to supply 13% of Xcel's retail electric energy than to supply 2%.

Excelsior's current plans for the Mesaba Project are for the construction period of the Mesaba Unit 1 to occur between 2008 and 2011 and for Unit 1 to be completed and operating at full capacity in 2012.73 A realistic timetable for the Mesaba Project being able to provide electric energy to Xcel's retail customers is 2014.74 Even if the Mesaba Project were found to be a least-cost resource, the Project will be incapable of providing electrical power to supply 13% of Xcel's retail customers before that potential statutory power supply entitlement expires on January 1, 2012.

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66 Excelsior's Reply Brief at pp. 1-2.

67 *See* further in attached Memorandum that follows at pp. 32-33.

68 Commission's August 30, 2007, Order at p. 16.

69 For example, (P2)

70 *See* Finding No. 38.

71 Minn. Stat. § 216B.1693(a).

72 Phase 1 Finding No. 198; (P2) 2094 at Finding No. 198.

73 (P2) EE-1110.

74 (P2) EE-1307 at p. 6-7.

These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

To the extent that the Memorandum that follows contains additional findings of fact, including findings on credibility of witnesses, the same are hereby incorporated into these findings.

The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based on these Findings of Fact, and for reasons set forth in the following Memorandum, the Administrative Law Judges make the following:

CONCLUSIONS OF LAW

1. The Minnesota Public Utilities Commission and the Administrative Law Judges have jurisdiction over this matter pursuant to Minn. Stat. §§ 216B.08, 216B.1693, 216B.1694, and 14.50, Minn. R. 1400.5100-.8400, and to the extent not superseded by those rules, Minn. R. 7829.0100-.3200.

The Commission gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule, and has the authority to take the action proposed.

Since the Project is an Innovative Energy Project under Minn. Stat. § 216B.1694, subd. 2(a)(4) and is therefore also as a Clean Energy Technology under Minn. Stat. § 216B.1693.

The Project and its technology do not satisfy the requirements of Minn. Stat. § 216B.1693(a) because the Project is not likely to be, a least cost resource, including the costs of ancillary services and other necessary generation and transmission upgrades, to provide 13% of the electric energy that Xcel supplies to its retail customers.

It would be contrary to the public interest for the Project to supply 13% percent of Xcel Energy's retail load starting in 2012.

The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

Based on the foregoing Conclusions, and for reasons set forth in the following Memorandum, the Administrative Law Judges make the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Public Utilities Commission **DENY** Excelsior Energy's Petition asking the Commission to determine that, under the terms of Minn. Stat. § 216B.1693, 13% of the energy supplied to Xcel Energy's retail customers should come from the Units I and II of the Mesaba Energy Project by 2013.

Dated: September 14, 2007

s/Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

I. The Scope of Phase 2 Proceedings

A. Issues submitted to and adjudicated by the Commission in Phase 1 cannot be revisited in Phase 2.

On April 12, 2007, the ALJs issued findings of fact, conclusions of law, and a recommendation to the Commission after completing Phase 1 of this proceeding.75 Their report addressed the first two of the three issues that the Commission had referred to them—namely, whether the Commission should:

> 1) approve, 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; and
>
> 2) determine that the coal-fueled Integrated Gasification Combined 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 two percent of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693;76

Minn. R. 1400.8300 provides in relevant part:

> Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction to amend the report except for clerical or mathematical errors. Unless the report is a final order, binding on the agency, petitions for reconsideration or rehearing must be filed with the agency.

Thus, when the Phase 1 Report was transmitted to the Commission, the undersigned ALJ lost jurisdiction to reconsider or modify any of the findings and conclusions contained in the ALJs' Phase 1 report. What remained for determination in Phase 2 was the third issue that the Commission referred—that is, whether the Commission should:

> 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 2013.77

The Commission's August 30, 2007, Order made a final determination of the first issue that the Commission referred for a contested case proceeding—namely, whether the Commission should "approve, 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." Only the Commission has the authority to reconsider its

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75 (P2) XE-2094.
76 Commission Order of April 25, 2006, at p.1.
77 *Id*.

determinations regarding interpretation and application of that statute. It appears, however, that the Commission's Phase 1 Order did not address the second issue in Phase 1—whether, under Minn. Stat. § 216B.1693, the Mesaba Project qualifies as a Clean Energy Technology and is or is likely to be, a least-cost resource for supplying at least two percent of the energy supplied to Xcel's retail customers. However, the ALJs also submitted that issue to the Commission for final determination, since the undersigned ALJ cannot revisit the prior proposed findings of fact or conclusion relating to that second issue unless in the absence of a remand by Commission for further proceedings.

The Commission's August 30, 2007, Order has the effect of further narrowing the scope of what may be addressed in Phase 2 and what evidence is relevant in Phase 2. In that Order, the Commission found that the Mesaba Project is an Innovative Energy Project under Minn. Stat. § 216B.1694.78 Since the statutory test of what is an Innovative Energy Project is functionally identical to the test in Minn. Stat. § 216B.1694 for what is Clean Energy Technology,79 the Mesaba Project necessarily qualifies as a Clean Energy Technology under Minn. Stat. § 216B.1693(c). The parties may therefore not relitigate in Phase 2 whether the Mesaba Project qualifies as a Clean Energy Technology.

In the absence of a remand from the Commission, the parties also may not revisit whether the Project is likely to be a "least-cost" resource to provide 2% of the electric energy that Xcel supplies to its residential customers and whether it would be contrary to the public interest for the Project to do so.

B. Issues to be Determined in Phase 2 and Burden of Proof.

Minn. R. 1400.7300, subp. 5, provides that in a contested case proceeding:

> [t]he party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.

Minn. Stat. § 216B.1693 does not provide a different standard. Therefore, Excelsior bears the burden of proving by a preponderance of the evidence that (1) the Mesaba Project is likely to be a least cost resource to provide 13% of the electric energy that Xcel supplies to its retail customers between during the relevant period;80 and (2) if so, whether it would be contrary to the public interest for the Commission to determine that

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78 Commission's August 30, 2007, Order at pp. 9-13.

79 Phase 1 Report at p. 74.

80 As discussed above, the ALJ concludes that the outer terminus of that period is July 1, 2012; the Commission suggests that it might extend until as late as December 31, 2013. (Commission Order of April 25, 2006, at p.1.) Excelsior argues that it is anytime during the Project's useful life. (Excelsior's Initial Brief at p.2)

the Mesaba Project should provide 13% of the retail electric energy that Xcel will supply to residential customers by 2013.

C. Evidence presented by Excelsior in its Offer of Proof is inadmissible in this Phase 2 proceeding.

In the Order on Phase 2, the ALJ clearly indicated that the Phase 2 evidentiary hearing would not be an opportunity for parties to supplement the record with additional evidence relevant to the four issues that were previously addressed in Phase 1.[81] That record is closed until or unless the Commission directs it to be reopened.

The Phase 2 evidentiary record for prefiled testimony closed on May 14, 2007, when all parties were required to file their written surrebuttal testimony. During the May 15, 2007, prehearing conference, the parties waived their right of cross-examination at the impending Phase 2 evidentiary hearing and stipulated to determination of Phase 2 issues on a written record.[82] In addition to the prefiled testimony already introduced in Phase 2, the parties were given until June 4, 2007, to come to agreement about which exhibits previously admitted into evidence in Phase 1 would also become part of the Phase 2 hearing record.[83] During that prehearing conference, Excelsior also requested leave to file an offer of proof on June 22, 2007, when its initial Phase 2 brief was due.[84] The parties had not yet identified the documents they sought to have included in the hearing record, and the ALJ had made no exclusionary rulings on or before May 15, 2007. It was therefore unclear at the time what Excelsior precisely meant as an offer of proof. On June 5, 2007, Excelsior transmitted to the ALJ the documents that the parties had agreed would comprise the Phase 2 hearing record.

On June 22, 2007, Excelsior filed its Offer of Proof Regarding Evidence Excluded from the Phase 2 Record (Offer of Proof), consisting of written expert testimony from Donald H. Cortez and Andrew D. Weissman.[85] In effect, that testimony supplemented prefiled testimony that Messrs. Cortez and Weissman had given in Phase 1, but Excelsior had not previously offered it as Phase 2 prefiled testimony. Excelsior's stated reason for making the Offer of Proof was:

> Prior to the ALJ's Order on Phase 2, Excelsior had assumed that all of the testimony and evidence in Phase 1 would be incorporated as part of the record for Phase 2 and that Phase 1 witnesses could be called to

81 *Id*.
82 *Id*.
83 *Id*. at pp. 19-22.
84 *See* Transcript of May 14, 2007, prehearing conference at pp. 16-20
85 Both presented prefiled testimony in Phase 1, and that testimony has, in fact, been incorporated into the Phase 2 hearing record. *See* Exs. (P2) 1090 through (P2) 1103 and (P2) 1111 through (P2) 1114.

testify in Phase 2 under paragraph 8 of the Second Prehearing Order dated June 2, 2006, without having filed testimony in Phase 2.86

Paragraph 8 of the Second Prehearing Order provided:

> 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.

The ALJ has never ruled that Phase 1 evidence would generally be inadmissible in Phase 2.87 Rather, in the May 10, 2007 Order on Phase 2, the ALJ implicitly ruled only that neither Phase 1 evidence nor new evidence submitted in Phase 2 would be admissible for the purpose of reconsidering, altering, or amending Phase 1 findings. However, it was clear that Phase 1 evidence having a tendency to prove or disprove facts material to Phase 2 issues would be admissible in Phase 2. The fact that Phase 1 exhibits comprise most of the evidence in the Phase 2 hearing record shows that the parties clearly understood that to be the case. The primary purpose of paragraph 8 of the Second Prehearing Order was to permit parties to call live witnesses "to summarize their prefiled testimony" previously submitted in Phase 2. Since Excelsior offered no *updated* prefiled testimony from Messrs. Cortez and Weissman in Phase 2, Excelsior's only *right* under the paragraph 8 of the Second Prehearing Order would have been to present a summary of their Phase 1 testimony to the extent that testimony is relevant to Phase 2 issues. That kind of summary testimony from Messrs. Cortez and Weissman would have been repetitious.

The Second Prehearing Order does not give parties leave to update or supplement prefiled testimony with oral testimony on new or additional matters, except "for good cause shown." Even when a party makes such a showing, Minn. Stat. § 14.60 requires that "[e]very party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence." During the May 15, 2007, prehearing conference, Excelsior did not make a showing of good cause to support a request to supplement the Phase 2 record with additional testimony. Yet, when Excelsior filed its Offer of Proof, it expressly indicated that supplementation of the Phase 2 record was its purpose when it stated that "significant relevant events since the filing of Phase 1 testimony have created a need to present new matters and information set forth in [Excelsior's] Offer of Proof."88 In short, Excelsior now seeks to introduce supplementary testimony from Messrs. Weissman and Cortez to support its Phase 2 contentions. The parties jointly waived their right to cross-examine witnesses and agreed to submit Phase 2 to the ALJ on a written record. Although the opposing parties may have waived their right to conduct oral cross-examination of Messrs. Cortez and

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86 Offer of Proof at p. 1.

87 The ALJ made no exclusionary rulings on evidence in either the Phase 2 Order or at the May 15, 2007, prehearing conference.

88 *See* Excelsior's Offer of Proof at p. 3.

Weissman, they did not waive their right to present rebuttal evidence to what is, in effect, written supplemental direct testimony.

In summary, the ALJ concludes that the written testimony of Messrs. Cortez and Weissman contained in Excelsior's Offer of Proof is not admissible either to revisit Phase 1 issues that have been referred to the Commission issues or to supplement their prefiled testimony on the Phase 2 record. If the Commission should conclude that the written testimony of Messrs. Weissman and Cortez is not repetitive but necessary for resolving either Phase 1 or Phase 2 issues, it may wish to remand proceedings to the ALJ for inclusion of that evidence in the record and to provide opposing parties with an opportunity to present rebuttal evidence.

II. Whether the Project Is Likely to Be a Least-Cost Resource for Xcel after January 1, 2012, Is Immaterial.

A. The power supply entitlement in Minn. Stat. § 216B.1693 expires on January 1, 2012.

Excelsior argues that "it is not necessary that the Commission find that IGCC technology is currently a least-cost resource; rather the only finding required is that IGCC technology is or is likely to be a least-cost resource over the life of an IGCC plant."89 Implicit in that view is that, once established by the Commission, Xcel's legal obligation under Minn. Stat. § 216B.1693(a) to purchase a percentage of its retail electric power from a clean energy technology extends throughout the life of the plant. However, Minn. Stat. § 216B.1693(d) provides that "[t]his section expires January 1, 2012." Excelsior interprets that to mean that Section (d) merely sets the date by which the Commission must determine the percentage of retail energy that Xcel is obligated to purchase from Excelsior.90 On the other hand, Xcel and Minnesota Power argue for a literal interpretation of Minn. Stat. § 216B.1693(d).91

Excelsior's interpretation of the expiration provision is based on what it argues was the Legislature's intent—that is, "to help pave the way for a better energy future in Minnesota by encouraging the long-term deployment of IGCC technology."92 It seeks to establish that intent in two ways: First, it cites a 2003 letter from the Governor to the Senate and letters after enactment from Representatives Sviggum and Beard and Senator Tomassoni as evidence that the Legislature intended to create long-term incentives for deployment of IGCC power in Minnesota that continued well beyond January 1, 2012. Second, it seeks to apply the eight statutory factors for ascertaining

89 Excelsior's Initial Brief at p. 2.
90 Excelsior's Reply Brief at p. 5.
91 In Finding No. 191 of the Phase 1 Report (Ex. (P2) XE-2094), the ALJs noted the existence of legal issues relating to the expiration date in Minn. Stat. § 216B.1693(d). However, since none of the parties raised that issue in Phase 1, the ALJs did not address it then.
92 *Id*.

legislative intent found in Minn. Stat. § 645.16, as well as Minn. Stat. § 645.17's presumptions in ascertaining legislative intent.

First, the communications by the Governor and members of the Legislature that Excelsior relies on are either irrelevant, inadmissible to establish legislative intent, or both. In his May 23, 2003 letter, the Governor communicated to members of the Senate a number of objections he had to H.F. 9, which the House had passed the day before and had sent to the Senate for its consideration.93 The third paragraph of the Governor's letter stated:

> The coal-gasification plant technology proposed for the Excelsior Energy project will provide base-load power with clean emissions, helping pave the way for a better future. The project also provides economic development opportunities in a region of the state that has suffered significant job losses. The project has merit and it should be encouraged, but not at the expense of true renewable initiatives."

The Governor's letter sheds no light on his position on whether there should be an expiration date for the proposed Minn. Stat. § 216.1693 and, if so, what that expiration date should be. Moreover, even if the Governor's letter is taken as an expression of his desire for a long term power supply entitlement in Minn. Stat. § 216.1693 extending into the indefinite future, the Legislature passed a bill on the following day that included the explicit expiration date in Minn. Stat. § 216.1693(d), and the Governor subsequently signed that amended version of the bill into law. Excelsior also relies on some more recent statements by legislators, including some bill authors, as to what the Legislature may have intended when it passed H.F. 9. However, comments and statements of legislators, including authors, *made after a statute has been passed* "are inadmissible for the purpose of construing a statute."94

Second, the problem with Excelsior's interpretation of Minn. Stat. § 216B.1693(d) is that the question of legislative intent does not arise where, as here, the statute is unambiguous. "[I]f the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted."95 One simply gives the statute effect according to the meaning of its plain language.96 It is only when it becomes necessary to construe an ambiguous statute that one seeks "to ascertain and effectuate

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93 Ex. (P2) EE1012.

94 *Krueth v. Independent School District No. 38*, 496 N.W.2d 829, 834 (Minn. App. 1993). The logic behind the principle is that the political environment changes from session to session and from year to year. What the Legislature's current intent with regard to the meaning of a statute can be materially different from what the Legislature's intent may have been in 2003 at the time the statutes were enacted.

95 *Owens v. Water Gremlin Co*., *605 N.W.2d 733, 736; (Minn. 2000)*

96 *In the Matter of Detailing Criteria and Standards for Measuring an Electric Utility's Good Faith Efforts in Meeting the Renewable Energy Objectives Under Minn. Stat. § 216B.1691*, 700 N.W.2d 533, 536 (Minn. App. 2005).

the intention of the Legislature."97 In other words, a condition precedent to applying the provisions of Minn. Stat. §§ 645.16 and 645.17 to ascertain legislative intent is that the language of the statute first be found to be ambiguous. There is nothing ambiguous about "[t]his section expires January 1, 2012." The Legislature commonly places that specific language in statutes to alert the public of the date on which a statute ceases to have the force and effect of law. In practical effect, that language tells the Revisor of Statutes when to remove the statute in its entirety from published versions of Minnesota Statutes—in this case on January 1, 2012—unless the Legislature has subsequently acted to change or remove the expiration date.98 Here, the Legislature has not subsequently changed or removed the expiration date in Minn. Stat. § 216B.1693(d); the entire section therefore ceases to have the force and effect of law on January 1, 2012.

Finally, Excelsior argues that any interpretation of Minn. Stat. § 216B.1693(d) other than its own would defeat the purpose of the statute, undermine the legislative intent behind the law and eliminate the intended effect of the statute, "which is to encourage the development of IGCC plants to serve Minnesota's need for base load power."99 In other words, Excelsior argues that there is no reasonable explanation for having the statute and the entitlement and obligation that it creates expire on January 1, 2012. The ALJ also disagrees with that analysis. In its Phase 2 argument, Excelsior proposes that Minn. Stat. § 216B.1693 evidences a legislative "intent to enable clean energy technology to establish to establish a foothold in Xcel's generation portfolio . . . ."100 In the ALJ's view that proposition is only partly correct. First of all, by enacting Minn. Stat. § 216B.1693, the Legislature did not *guarantee* clean energy technology a foothold in Xcel's generation portfolio; it only provided clean energy technology *an opportunity* for such a foothold if other statutory conditions could be met. Second, the plain language of Minn. Stat. § 216B.1693(d) indicates that Legislature only offered an opportunity for a foothold in Xcel's generation portfolio that would be available until January 1, 2012, about eight and one-half years from the date of enactment. If Excelsior or other potential IGCC providers could not avail themselves of the opportunity before then, it would be necessary for them to return to the Legislature and seek reenactment. That is a legislative intent that is consistent with the plain meaning of Minn. Stat. § 216B.1693(d).

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97 Minn. Stat. § 645.16 (2006).

98 *See* THE OFFICE OF REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL WITH STYLES AND FORMS (2002 Ed.) § 4.7(e), (also available at http://www.revisor.leg.state.mn.us/revisor/pubs/bill_drafting_manual/Cover-TOC.htm).

99 Excelsior's Reply Brief at p. 5.

100 *Id*. at pp. 1-2.

B. What may be a least-cost resource for Xcel after January 1, 2012, is immaterial.

The legal consequence of a statute expiring is that the statute is removed from the body of Minnesota Statutes and no longer has legal force and effect. The Commission has no existing inherent or other statutory authority to compel Xcel to purchase electric power from Excelsior to supply a percentage of Xcel's retail customers that would obligate Xcel to continue such purchases beyond January 1, 2012. Therefore, any entitlement of a clean energy technology and corresponding obligation of Xcel expires on that date. Minn. Stat. § 216B.1693(d) also necessarily establishes January 1, 2012, as the end point for determining when a clean energy provider "is likely to be a least-cost resource."

Excelsior suggests that it is only necessary for it to establish that IGCC technology in some form would be a least-cost resource for Xcel at any some between now and the end of an IGCC Project's useful life in order to satisfy Minn. Stat. § 216B.1693(a).101 First, there is nothing in the language of the CET Statute itself suggesting that the possibility of an IGCC project being a least-cost resource at some indeterminate future date has any bearing on the entitlement the Legislature created in that statute. Second, there is evidence in the record indicating that the farther into the future that one attempts to project costs and the continued viability of technology, the more speculative such projections become. Since no statutory entitlement or obligation exists after January 1, 2012, one can reasonably infer that the Legislature intended to keep such speculation to a minimum by requiring the Commission to focus on what is likely to be a least-cost resource on or before that date. Therefore, evidence of what may or may not be a least-cost resource after January 1, 2012, is immaterial and irrelevant.102

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101 The ALJ could find no evidence in the record establishing what the Project's useful life is. Presumably, it is in the range of 25 to 30 years.

102 In its April 25, 2006, Order, the Commission framed the issue in Phase 2 as whether it should 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." Minn. Stat. § 216B.1693(d) appears to preclude consideration of what may be a least-cost resource in 2013. However, using that date for purposes of determining when status of a least-cost resource is germane yields the same result, since Excelsior itself estimates that the Project would be unable to supply the power required by 13% of Xcel's retail customers before 2014.

III. The Power Supply Entitlement in Minn. Stat. § 216B.1693 is, in the first instance, specific to the Mesaba Project.

A. The Legislature intended the CET Statute's power supply entitlement to be specific to the Mesaba Project unless contrary to the public interest.

Excelsior frames the ultimate issue in Phase 2 as whether "IGCC technology is or is likely to be a least-cost resource over the life of an IGCC plant."103 In other words, it contends that the CET Statute requires the Commission to determine whether IGCC power in the abstract is likely to be a least-cost resource without reference to any specific project at any particular location or particular time frame. It then argues that if the Commission should find that to be the case, Xcel would be obliged to purchase at least two percent of its retail load from some entity generating power from IGCC technology—again, without reference to who that supplier might be or when the IGCC power may be available. Excelsior then suggests that since it is the only IGCC power producer in a position to take advantage of the entitlement, the Commission should find that the Project should have the benefit of the entitlement.

First of all, the CET Statute does not, as Excelsior suggests, direct the Commission to determine whether *IGCC power* is likely to be a least-cost resource. The CET Statute directs the Commission to determine whether "*clean energy technology*" is "likely to be a least-cost resource." There is no evidence in the record establishing that any other IGCC power producer would necessarily qualify as clean energy technology. Moreover, even if other IGCC projects were to qualify as clean energy technology, Minn. Stat. § 216B.1693(b) gives the Mesaba Project a statutory preference to supply Xcel's retail customers:

> (b) Electric energy required by this section *shall be supplied* by the innovative energy project defined in section 216B.1694, subdivision 1, unless the commission finds doing so contrary to the public interest. [Emphasis supplied.]

Excelsior argues that "the CET Statute refers to a specific project only when describing the preferred source of the CEM energy."104 However, "shall be supplied" is mandatory language, and the statutory preference is therefore a mandatory preference and not a discretionary one. In other words, the supplier of clean energy technology under Minn. Stat. § 216B.1693(b) must, in the first instance, be an Innovative Energy Project unless contrary to the public interest. It is therefore necessary to consider what kind of project meets that qualification. Among other things, the innovative energy project statute, Minn. Stat. § 216B.1694, subd. 1, requires that an innovative energy project be "a proposed energy-generation facility or group of facilities which may be located on up to three sites":

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103 Excelsior's Initial Brief at p. 2.
104 Excelsior's Reply Brief at p. 3.

(3) that is designated by the commissioner of the Iron Range Resources and Rehabilitation Board as a project that is located in the taconite tax relief area on a site that has substantial real property with adequate infrastructure to support new or expanded development and that has received prior financial and other support from the board.

Neither IGCC technology generally nor any specific IGCC project other than the Mesaba Project meets that statutory requirement. Therefore, the governing legislation begins by being project-specific, since the Commission must first consider whether the Mesaba Project "is or is likely to be likely to be a least-cost resource" for Xcel. The Commission can only consider another IGCC power producer if the Mesaba Project fails to qualify as a clean energy technology or if giving the entitlement to the Mesaba Project would be contrary to the public interest.

B. If the Mesaba Project itself is not eligible to supply 13% of the electric power to to Xcel's retail customers, then Excelsior no longer has standing to argue that some other IGCC power producer should be entitled to do so.

In the federal system, the doctrine of standing is an aspect of the "case and controversy" requirement in Article III, Section 2, of the U. S. Constitution. It requires that the "parties … *continue to have* a personal stake in the outcome of the lawsuit."105 [Emphasis supplied.] The Minnesota Supreme Court has similarly held that a party to an administrative proceeding must demonstrate a particularized interest in the proceeding, and that "[s]tanding may be conferred by statute or it may exist by reason of judicial recognition of a particular relationship between a person and an actionable controversy."106 Specifically, a party has standing to maintain a petition for Commission action only if that party would potentially suffer an "injury in fact" as a consequence of the Commission's decision.107 A party may not rely on someone else's particularized interest to establish standing.

Excelsior's Phase 2 argument appears to be that IGCC technology generally is likely to be a least-cost resource for Xcel at some future time; therefore, the Commission should require that 13% of Xcel's generation portfolio for retail customers be supplied by some provider of IGGC-produced electric power. However, that provider may only be some IGCC power supplier other than the Mesaba Project if the Commission determines that the Mesaba Project itself is an ineligible power supplier because it not a least-cost resource for Xcel or because allowing it to provide power to Xcel's retail customers would be contrary to the public interest. However, in that event,

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105 *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990); *see generally Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

106 *Matter of Sandy Pappas Senate Committee*, 488 N.W.2d 795, 797 (Minn.1992).

107 *Id*.

Excelsior would no longer have the potential "injury in fact" necessary for standing to petition the Commission to determine that some other IGCC power producer be required to provide 13% of the energy supplied to Xcel's retail customers.

IV. The Mesaba Project Is Not Likely To Be a Least-Cost Resource to Provide 13% of the Energy Supplied to Xcel's Retail Customers by 2013.

A. The Commission has authority to determine that the Mesaba Project is entitled to supply 13% of the electric energy to Xcel's retail customers.

Minn. Stat. § 216B.1693(a) provides that if the Commission finds that the Project qualifies as a clean energy technology and is a least-cost resource, then Xcel must supply "*at least two percent* of the electric energy provided to retail customers" from electric energy supplied by the Project. [Emphasis supplied.]

> (a) If the commission finds that a clean energy technology is or is likely to be a least-cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary, the utility that owns a nuclear generating facility shall supply *at least two percent* of the electric energy provided to retail customers from clean energy technology. [Emphasis supplied.]

The figure of 2% is clearly the statutory floor for Excelsior's power supply entitlement if the Project meets the clean energy technology, innovative energy project, and least-cost resource requirements and if the Commission concludes that supplying that much power to Xcel is not contrary to the public interest. Although Minn. Stat. § 216B.1693 does not explicitly give the Commission further directions about what to consider in determining what the appropriate percentage should be, some criteria can be inferred from other provisions of the CET Statute. Minn. Stat. § 216B.1693(b) clearly indicates that whatever percentage the Commission might consider appropriate must not be contrary to the public interest. Minn. Stat. § 216B.1693(a) indicates that the electric energy supplied by the Project must be a least-cost resource for "the utility that owns a nuclear generating facility," i.e., Xcel, and Minn. Stat. § 216B.1693(d) indicates that electric energy supplied by the Project must be a least-cost resource for Xcel during the period from the date following enactment—from May 30, 2003, until January 1, 2012.

What is less clear is the origin and significance of Excelsior's 13% request. Excelsior has not elaborated about why it believes it should be entitled to provide 13% of the electricity supplied to Xcel's retail customers. The Department argues that it resulted from an erroneous proposal to the Commission by Excelsior.[108] Xcel argues that 13% of what its retail load will be in 2012 roughly corresponds to the entire output of Mesaba Unit 2.[109] 13% of Xcel's current retail load in 2013 will be approximately

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108 Department's Initial Brief at p. 17.
109 Xcel's Initial Brief at p. 4.

644 MW, about 41 MW more than the output of Mesaba Unit 1. Therefore, it does appear that in both Phases 1 and 2, Excelsior intended to request power supply entitlements nearly equal to the entire net output of Mesaba Units 1 and 2, as currently planned.110

B. Enactment of the GWMA does not affect least-cost resource analysis under Minn. Stat. § 216B.1693(a).

In its 2007 session, the Legislature enacted the Global Warming Mitigation Act (GWMA),111 which is codified as Minn. Stat. § 216H.01 *et seq*. New Minn. Stat. § 216H.02,subd. 1, 112 establishes a goal for the state to:

> [r]educe statewide greenhouse gas emissions across all sectors producing those emissions to a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050.

The legislation requires the Commissioner of Commerce, in consultation with other state agency heads, to submit to the legislature a climate change action plan to meet that goal by February 1, 2008.113 Minn. Stat. § 216.02, subd. 6, further requires the state, "to the extent possible, with other states in the Midwest region, develop and implement a regional approach to reducing greenhouse gas emissions from activities in the region, including consulting on a regional cap and trade system." The Act goes on to require the Commissioner "to coordinate "Minnesota regional activities" directed to that end and to report progress to the legislature in February of 2008 and 2009. "[U]ntil a comprehensive and enforceable state law or rule pertaining to greenhouse gases that directly limits and substantially reduces, over time, statewide power sector carbon dioxide emissions is enacted and in effect," the GWMA imposes a temporary moratorium on the construction of new coal-fired generating plants in Minnesota.114 The moratorium also extends to the importation of electric energy from out-of-state coal-fired plants that would "contribute to statewide power sector carbon dioxide emissions."115 Both Excelsior's Project and the proposed Bigstone II SCPC plant in South Dakota are specifically exempted from the moratorium.116 Additionally, although the GWMA moratorium applies generally to other "large energy facilities," Minn. Stat. § 216H.03, subd. 1, also excludes facilities using "natural gas as a primary fuel" from that definition. Excelsior contends that the latter exclusion "virtually [guarantees] that almost

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110 The ALJ notes that the evidence establishes the Excelsior is scheduled to complete neither Mesaba Unit 1 nor Mesaba Unit 2 prior to January 1, 2012, when the CET Statute's power supply entitlement expires.
111 2007 Minn. Laws, ch. 136, Art. 5.
112 2007 Minn. Laws, ch. 136, Art. 5, § 2.
113 Minn. Stat. § 216H.02, subd. 2; *Id*.
114 Minn. Stat. § 216H.03, subd. 3, 2007 Minn. Laws, ch. 136, Art. 5, § 3.
115 Minn. Stat. § 216H.03, subd. 3, 2007 Minn. Laws, ch. 136, Art. 5, § 3.
116 *Id*.

all of the incremental energy demand growth that cannot be met with renewable energy will have to be met with yet more natural gas-fired generation."117

Excelsior's basic premise is that the moratorium on new coal-fired power supplies will result in such increases in demand for natural gas-fired power generation in Minnesota that the Mesaba Project's IGCC-produced power will become a least-cost resource for Xcel. Excelsior first cites estimates that statewide consumption of natural gas is expected to increase by 55,000,000 MMBtu between 2004 and 2011.118 Then, based on the assumption that a gas-fired plant requires 32,000,000 MMBtu of natural gas to generate 600 MW of electric power, Excelsior argues that construction of the Mesaba Project will reduce natural gas demand statewide by 2011 in an amount nearly equal to the entire projected increase in statewide demand between 2004 and 2011.119 Arguing, then, that the Mesaba Project will exert downward pressure on the price of natural gas, Excelsior asserts that the Project will not only provide Xcel with less expensive power, it will also "reduce pressure on the price paid for natural gas by Xcel" for its own natural gas-fired generation plants.120

There are several major weaknesses in Excelsior's position. First and perhaps most important, the future price of natural gas is subject to innumerable variables, and what the price of natural gas will be during the next four to five years cannot be known with any degree of certainty. During Phase 1, Excelsior and Xcel relied on different natural gas forecasts when they developed economic modeling to compare the cost and price of power produced by Mesaba Project. Excelsior's forecasts were not demonstrably more accurate and reliable than Xcel's. The Phase 2 record contains no evidence concerning the future price of natural gas that was not already part of the Phase 1 record,121 and there is therefore no reliable evidence to support Excelsior's assertion that enactment of the GWMA will drive the cost to Xcel of operating its own natural gas-fired plants to such high levels that the Mesaba Project's power will be least-cost by comparison. Nor is there any evidence that it would be less costly for Xcel to replace power supplied by its own natural gas-fired plants with power from the Mesaba Project.

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117 Excelsior's Initial Brief at p. 4.

118 (P2) EE1004, at p. 18.

119 The ALJ notes that there is nothing special about 600MW power generated by an IGCC plant in comparison with 600 MW of power generated by some other resource. Thus, for example, 600 MW from a hydro plant or renewable generators would also displace the 32,000,000 MMBtu required to produce 600MW of power in a gas-fired plant.

120 Excelsior's Initial Brief at p. 6.

121 In its Offer of Proof, Excelsior has tendered additional written opinion evidence on natural gas pricing from Mr. Weissman, but the ALJ has ruled that evidence to be inadmissible in Phase 2, as untimely filed and therefore depriving opposing parties of the opportunity to present rebuttal evidence.

Second, contrary to Excelsior's assertion, reducing 600 MW of gas-generated power in Minnesota by 2011 will not measurably impact the price everyone in the country, including Minnesotans, pays for natural gas. The State of Minnesota does not constitute a discrete natural gas market. Natural gas is a commodity in a national market, and its supply, demand, and price depend on what occurs nationally and not just in Minnesota.

The evidence also does not support the need for Xcel to rely on additional natural gas-fired power generation to meet its needs between now and 2013. Xcel's position, which is supported by the Phase 2 testimony of Elizabeth Engleking, is that it can meet any incremental demand between now and January 1, 2012, with energy produced from a combination of renewable and hydro sources that is less expensive than any power the Mesaba Project could supply.122 The GWMA also would not prevent Xcel from purchasing power on the grid from a coal-fired facility whose emissions would not contribute to Minnesota's statewide carbon dioxide emissions. In other words, the only new evidence offered by any party in Phase 2 established that Xcel will not require additional natural gas-produced power at least through 2013, and that the Project is not likely to be a least-cost resource for Xcel anytime during the next six years. 123

A final major weakness in Excelsior's argument is that it assumes that by 2013 the Mesaba Project will be exclusively fueled by coal. Yet the Commission has found that the Project itself is likely to use substantial amounts of natural gas as a fuel during its ramp-up period:

> * * * The Commission concurs with the ALJs shifting all risks associated with fuel costs to Xcel and its ratepayers is unreasonable and inconsistent with the public interest.
>
> This is especially true of natural gas costs, which are high and volatile. The terms and conditions of the proposed contract contain generous provisions increasing capacity payments to account for Mesaba's anticipated heavy reliance on natural gas during the three-year "ramp-up" period. These provisions permit Mesaba to consume unusually high amounts of natural gas for a baseload facility on the theory that higher fuel costs during the shakedown period will facilitate major cost savings later, when the facility will run on low-cost solid fuel.
>
> Once the ramp-up period has ended, however, even with the contract's financial penalties for burning natural gas, Xcel would still pay roughly double the normal capacity cost of natural-gas-fired generation when Mesaba ran on natural gas. [Citation omitted.]

In other words, the Mesaba Project is likely to begin using unusually high amounts of natural gas when it initially becomes operational in 2014 and during a ramp-up period of

122 (P2) XE-2082; (P2) XE-2083.
123 (P2) EX-2082; (P2) XE-2083.

at least three years thereafter. That fact alone would make the Mesaba Project as vulnerable to high natural gas costs as natural gas-fired power plants during the immediate future.

Finally, the moratorium established by the GWMA is a temporary one that is in effect only until there are Minnesota laws on the books dealing with regulating carbon emissions. After that occurs, there will be no legal barrier to constructing new Minnesota coal-fired generating plants. Although one cannot know with certainty when a system of carbon regulation will become law, it is reasonable to assume that that will occur sooner rather than later. Excelsior concedes that "a realistic timetable" for the Mesaba Project to be able to provide 13% of the electric energy required by Xcel's retail customers "is 2014."124 In other words, even if Xcel's natural gas costs were to rise significantly within the next four and one-half years, Excelsior would still not be in a position to provide Xcel with an alternative source of power until after the statutory entitlement to supply Xcel with a percentage of its retail load expires.

D. The Project's relatively low particulate emissions do not increase the likelihood that it will be a least-cost resource to provide 13% of the electric energy supplied to Xcel's retail customers.

Excelsior argues that the health benefits to society of IGCC's reduced emissions of fine particulate matter ($PM_{2.5}$) justify a finding that IGCC is likely to be a least-cost resource, even if the direct costs of constructing an IGCC plant are higher than those of constructing a traditional coal plant.125 Citing a report from its contractor ICF Consulting,126 Excelsior asserts that the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions of a SCPC plant are approximately $105 million per year greater than those associated with IGCC technology, and that that fact alone makes the Project more likely to be a least-cost resource in comparison with SCPC coal plants.

First of all, the ICF Consulting report does not conclude that IGCC technology Project would create a health care benefit for Minnesotans; the report only concludes that the adverse health effects of an IGCC power plant would be less than those attributable to a hypothetical SCPC plant. In fact, operation of both Mesaba Units 1 and 2 will emit additional $PM_{2.5}$ into the State's atmosphere because energy supplied by the Mesaba Project will not be replacing energy now being supplied from any existing conventional coal plant in Minnesota. In other words, constructing and operating the Project without having it replace an existing conventional coal plant will actually diminish air quality in the state, not improve it. Moreover, even though the Project's particulate matter emissions may be less than those associated with current technology in conventional SCPC coal plants, emission control technology continues to improve, and whether the Project's control of particulate matter will be more effective than that of future SCPC plants is a matter of speculation.

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124 (P2) EE-1307 at p. 6-7.
125 Excelsior's Initial Brief at p. 6.
126 (P2) EE 1011.

In their Phase 1 Report, the ALJs made the Project-specific finding that the Project's estimated particulate emissions would be generally lower than "[t]he particulate matter emissions of "other traditional solid fuel baseload technologies."127 However, as discussed above, the entitlement in Minn. Stat. § 216B.1693(a) is, in the first instance, specific to the Mesaba Project. The ICF report that Excelsior relies on is not Project-specific evidence. It only states that IGCC technology *in general* reduces fine particulate matter ($PM_{2.5}$) more than traditional coal plant. On the other hand, Dr. Amit reached a contrary conclusion in Phase 1 testimony that provided Project-specific comparisons. He compared the Mesaba Project with "three actual supercritical plants in different stages of construction or design by Minnesota utilities."128 His comparisons included the externalized cost of the adverse health effects of the $PM_{2.5}$ emissions, and he concluded that, when one accounts for emission costs, including those attributable to particulate matter, by using the externality values set by the Commission, power supplied by the Mesaba Project is not a least-cost resource.129 Dr. Amit's project-specific evidence is more relevant and reliable than the generalized, hypothetical evidence in the ICF Consulting report.

E. The Project's potential to capture and sequester carbon does not increase the likelihood that it will be least-cost resource to provide 13% of the electric energy supplied to Xcel's retail customers within the foreseeable future.

Excelsior also suggests that IGCC technology's ability to capture carbon contributes significantly to it being a least-cost resource in comparison with conventional coal-fired technology. First of all, analyses performed by the MPCA establish that the CO_2 emissions from the Project are expected to be higher than those of conventional coal technologies.130 Although the Project's IGCC technology has the potential to capture and sequester carbon, Excelsior has no current plans to install the necessary equipment, and it has indicated that it does not intend to do so "until it is required by law."131 Thus, the Mesaba Project now only has the unrealized potential to capture and sequester carbon—potential that is unlikely to be realized by January 1, 2012, or even sometime in 2013. Excelsior's earliest estimate for when the Project could be equipped to capture 30% of the Project's CO_2 emissions is 2014.132 Excelsior's own expert witness, Mr. Cortez, indicated that the favorable financial implications of the Project's carbon capture potential are likely to be most meaningful only when viewed over the very long term of the Project's life cycle.

Excelsior provides some estimates of the internalized costs for equipping the Project to capture and sequester carbon 30% of the Project's carbon emissions;

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127 Phase 1 Finding No. 72.
128 Commission's Phase 1 Order at p. 16.
129 (P2) DOC 3017 and (P2) DOC 3023.
130 Phase 1 report at Finding No. 146.
131 Phase 1 report at Finding No. 152.
132 (P2) EE-1067 at p. 2.

however, it concedes that those estimates are based on uncertain assumptions; and they do not account for the 70% of the Project's CO_2 emissions that will be released into the atmosphere.133 Because of that and because the Project today still has only the *potential* to capture and sequester carbon, estimating costs of emissions, including carbon, as externalities is still the more reliable approach to comparing the cost of Mesaba Project's carbon emissions to those of conventional coal plants. Dr. Amit took that approach when he compared the Project's costs with those of the Bigstone II Project, which is also exempt from the GWMA moratorium. He concluded that the Project's levelized price per MWh would be significantly higher than that of the Bigstone II project. Similarly, Xcel's expert witness, Ms. Engleking, concluded that the present value revenue requirement (PVRR) for Xcel's generation system would be $2.5 billion greater using the Project as a resource than with the alternative energy resources in Xcel's current, approved resource plan.134 Ms. Engleking's analysis also factored in carbon emissions as an externality. In short, a preponderance of reliable evidence establishes that the Project's mere potential to incorporate technology to capture and sequester carbon in the future does not make the Project more likely to be a least-cost resource.

F. Excelsior has failed to prove by a preponderance of the evidence that the Project is likely to be a least-cost resource to provide 13% of the energy supplied to Xcel's retail customers.

In their Phase 1 report, the ALJs found and concluded that the Project was not likely to be a least-cost resource to provide 2% of the electric energy that Xcel provides to its retail customers. However, the Commission's Phase 1 Order only explicitly addresses issues raised by application of Minn. Stat. § 216B.1694 to Excelsior's proposed PPA with Xcel. That Phase 1 Order does not explicitly address application of Minn. Stat. § 216B.1693—including whether the Mesaba Project is likely to be a least-cost resource to provide 2% of the energy supplied to Xcel's retail customers. However, the Commission found that:

> Mesaba's power prices would depend upon the costs to construct and operate the plant and would fluctuate over time with inflation, fuel costs, and operation and maintenance expenses. Power prices would also depend upon whether Excelsior eventually installs carbon capture and sequestration equipment, which is projected to cost over a billion dollars and to reduce the plant's efficiency by approximately 10%.135

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133 (P2) EE-1068. For example, the nearest locations that are geologically favorable for sequestration of captured carbon are in north central North Dakota, southwestern Manitoba, and southeastern Alberta, and pipelines would have to be built to pump the carbon dioxide to those locations for sequestration.

134 (P2) EX-2082 at 2.

135 Commission's August 30, 2007, Order at p. 15, incorporating Findings 185-187 in the Phase 1 Report).

The Commission then went on to find:

> Buying this unneeded baseload capacity would force [Xcel] to forgo the less expensive supplies it proposes to secure in its resource plan, at an estimated additional cost of $30.80 per megawatt hour during the three-year period (ALJ Finding 175). These additional costs would translate into unnecessary rate increases of $5.00 to $7.00 per month for residential customers and $2,700 to $3,900 per month for commercial and industrial customers during the first year of the contract as initially proposed, with declining rate impacts thereafter (ALJ Finding 115).136

Based on those findings, the Commission concluded that "[u]nnecessary rate increase of this magnitude are unreasonable on their face." Implicit in those findings and that conclusion is that the Mesaba Project is not likely to be a least-cost resource to provide 2% of the energy supplied to Xcel's retail customers.

The issue in Phase 2 is whether the Commission should exercise its statutory discretion to raise that percentage from 2% to 13%. As previously noted, the questions that must be addressed in Phase 2 are: (1) whether anything has occurred since the ALJs' issued their Phase 1 report on April 12, 2007, that makes it more likely that Excelsior's Project will be a least-cost resource to supply 2% or more (specifically 13%) of the electric energy supplied to Xcel's retail customers; and (2) whether any evidence in the Phase 2 record that was not admitted in Phase 1 increases that likelihood. The ALJ concludes that no event has occurred since the Phase 1 Report to make it more likely that the Project is likely to be a least-cost resource for any percentage of Xcel's retail load, and that the evidence in the Phase 2 record tends to establish that it is even less likely that the Project is a least-cost resource to supply 13% of Xcel's retail electric energy than to supply 2%.

B.H.J.

136 *Id*. at p. 17.

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August 7, 2007

See Attached Service List

Re: ***In the Matter of the Petition of 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***
OAH NO.: 3-2500-17260-2
MPUC No. E-6472/M-05-1993

Dear Parties:

The documents listed below have been filed with the E-Docket system and served as specified on the attached service list.

Findings of Fact, Conclusions of Law and Recommendation
Service List as of 9/14/07

Sincerely,

s/Bruce H. Johnson

BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

Telephone: (651) 361-7839

BHJ:dsc

Enclosures

OAH No. 4-2500-17260-2
MPUC No. E-6472/M-05-1993

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CERTIFICATE OF SERVICE

In the Matter of the Petition of 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	OAH No. 4-2500-17260-2 MPUC No. E-6472/M-05-1993

Denise S. Collins, certifies that on the 14th day of September, 2007, she served a true and correct copy of the attached **Findings of Fact, Conclusions of Law and Recommendation** by serving as specified on the attached service list, addressed to the following individuals:

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Executive Secretary
MN Public Utilities Commission
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Attached service list