

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of Excelsior Energy Inc. and Its Wholly-Owned Subsidiary MEP-I, LLC For Approval of Terms and Conditions For The Sale of Power From Its Innovative Energy Project Using Clean Energy Technology Under Minn. Stat. § 216B.1694 and a Determination That the Clean Energy Technology Is Or Is Likely To Be a Least-Cost Alternative Under Minn. Stat. § 216B.1693

**EXCELSIOR ENERGY INC.'S
COMMENTS ON COMMISSION'S
NOTICE REGARDING
ADDITIONAL ISSUES**

Excelsior Energy Inc. ("Excelsior") submits these comments in response to the Commission's July 7, 2006 "Notice of Comment Period on Whether the Commission Should Specify Additional Issues To Be Addressed" ("Notice"). In particular, the Notice seeks comments on whether the Commission should supplement its April 26, 2006 *Notice and Order for Hearing and Order Granting Intervention Petition* in this docket ("Order for Hearing") to "request that parties specifically address:

- the costs of transmission upgrades and related facilities beyond the substation associated with the Mesaba Energy Project; and
- the costs of other infrastructure investments associated with the Mesaba Energy Project."

Excelsior respectfully notes that such a supplement is unnecessary on the grounds that: (i) it would be superfluous, since the Order for Hearing and pertinent statutes already require determinations that the proposed Power Purchase Agreement be in the public interest and that the subject IGCC Power Plant is, or is likely to be, a least cost resource — which determinations

necessarily will address all pertinent cost factors associated with the Mesaba Energy Project; (ii) it would unduly focus the proceedings and ultimate determinations on these particular transmission and infrastructure costs and costs in general, despite the Legislature’s specific directive to the Commission that in making its public interest determination, it take into consideration the Mesaba Energy Project’s five beneficial non-cost factors.

ANALYSIS

I. The Potential “Additional Issues” are Superfluous, in Light of the Fact That the Order for Hearing Assures that the Parties Will Fully Address in Discovery the Costs Under the PPA Tariff and the Costs of Transmission Upgrades Associated With the Project.

In its Order for Hearing, the Commission specifically stated that it “trusts and asks the Administrative Law Judge to ensure that the proceeding remains tightly focused on the facts and issues that must be resolved to act on Excelsior’s Petition. While the case may raise important issues of first impression—and may therefore lay the groundwork for the future resolution of related issues—those issues should not be explored or resolved here.” (Emphasis added.) In setting forth the “Issues to be Addressed,” the Commission again specifically noted that these proceedings must focus on whether Excelsior’s IGCC Power Plant “is or is likely to be, a least cost resource,” pursuant to Minn. Stat. § 216B.1693. *See* Issue No. 2 in the Order for Hearing.

Further, the Commission stated that resolution of its enumerated Issues “turns on numerous sub-issues; two of the most important are what contract prices are likely to be under different scenarios and assumptions and whether those prices are reasonable.” Thus, the Issues set forth in the Order for Hearing already subsume the questions of all pertinent costs associated with the Mesaba Energy Project — including the costs of transmission upgrades and related facilities and other infrastructure investments, to the extent these costs have a bearing on the reasonableness of the contract prices.

Indeed, under Information Requests and Subpoenas issued to date, there have been hundreds of inquiries exchanged amongst the parties and certain non-parties in this proceeding respecting anticipated costs of transmission upgrades and related facilities and other infrastructure investments associated with the Project.

In the realm of price and costs, the issue before the Commission is whether the all-in PPA contract price, when compared with alternatives that may be available in the marketplace and when giving due consideration to the Project's five beneficial, non-cost factors articulated by the Legislature (*i.e.*, the Project's economic development benefits to the state; its use of abundant domestic fuel sources; the stability of the price of its output; its potential to contribute to a transition to hydrogen as a fuel resource; and the emission reductions achieved by the Project, as compared to other solid fuel baseload technologies), constitutes a reasonable price which is consistent with the public interest. The all-in PPA contract price ultimately cover hundreds of line-item cost components of the Project, including the costs of transmission upgrades and related facilities and a cost component figure for other infrastructure investments associated with the Project. At this point in the proceedings, there is simply no reason to assume that the costs of transmission upgrades and related facilities and the costs of other infrastructure investments will prove to be controversial or will become significant issues in determining whether the overall PPA contract price is reasonable and in the public interest.

For example, in the case of "other infrastructure investments" that are outside the scope of the Project's Engineering, Procurement and Construction contract, Excelsior has estimated the cost of those investments as a line-item component of the ultimate PPA contract price and Excelsior (rather than Xcel ratepayers) bears all risk if the ultimate cost of those other infrastructure investments proves higher than its estimate. It remains to be seen whether the

other parties to this proceeding take issue with the reasonableness of Excelsior's estimate and/or the impact of that line-item on the overall PPA contract price. Thus, at this stage of the proceedings, there is no reason for the Commission to pre-ordain that these "costs of other infrastructure investments" necessarily be a matter of significant focus for the ALJ and the parties at hearing. Rather, the Commission should indeed trust the ALJ to ensure that the proceeding remains tightly focused only on the facts and issues — be they surrounding infrastructure investments or other costs associated with the Project — that must be resolved to act on Excelsior's Petition.

Excelsior also notes that the "is or is likely to be a least cost resource" question under the Clean Energy Technology Statute necessarily calls for consideration of "the costs of . . . ancillary services and . . . transmission upgrades necessary," *see* Minn. Stat. § 216B.1693(a). Further, the PPA specifically addresses the costs of transmission upgrades beyond the substation in Article 4. There is no need to supplement the Order for Hearing with respect to the costs of transmission upgrades and related facilities, since the MISO proceedings now underway will establish the exact upgrades required beyond the point of interconnection and will dictate what the costs of those upgrades will be as well as which parties will bear those costs. As noted above, the parties in the instant proceeding are already addressing these issues in discovery, and the record on these matters will surely be thoroughly developed, to the extent transmission upgrades and related facilities bear on the resolution of the issues before the ALJ. Again, with due respect, there is no reason for the Commission to single out these line-item components for unique scrutiny in these proceedings.

II. Inclusion of the Proposed Additional Issues in the Order for Hearing will Unduly Focus this Proceeding on Cost Issues Respecting Infrastructure Investments and Transmission Upgrades, which would be Contrary to the Specific Dictates of the Applicable Statutes.

While the Commission has rightly noted that contract price is an important component in its public interest determination pursuant to Minn. Stat. § 216B.1694 and its least cost resource determination under Minn. Stat. § 216B.1693, it would be inconsistent with the provisions of these statutes to dictate that the issues in this contested case be specifically focused on particular cost factors. Indeed, the Innovative Energy Project Statute and the Clean Energy Technology Statute specifically counsel against any such undue emphasis on costs and prices. As noted, Minn. Stat. § 216B.1694, subd. (a)(7), directs the Commission, in making its public interest determination on Excelsior's entitlement to the Power Purchase Agreement, to take into consideration the Project's five beneficial factors which are unrelated to any of the Project's costs, let alone specific line-item costs associated with transmission and other infrastructure investments.

Further, even with respect to Minn. Stat. § 216B.1693, the Legislature conditioned the Clean Energy Technology minimum on a finding that IGCC either "is" or "is likely to be" a least cost resource. (Emphasis added.)

This is a very different standard than if the Statute simply required that IGCC be "the least cost resource." First, the statutory requirement is satisfied if the IGCC technology either "is" a least cost resource, or in the future is "likely to be a" least cost resource – clearly indicating that the focus of this proceeding is to be not merely the present costs of such line-items as transmission upgrades or other embedded costs. Second, the Statute does not require IGCC to now be, or in the future, be, the least cost resource, but only "a" least cost resource, again evidencing that the emphasis of the Statutes is not a traditional "least cost" determination.

The contemplated additional Issues clearly will be thoroughly discovered and analyzed by the parties in this proceeding, and evidence about these issues will appear in the record to the extent it is shown to be pertinent to the Commission's determinations. With due respect, the Commission should not prejudge and overly-emphasize the roles of these transmission and other infrastructure investment line-item cost figures within the larger public interest context established by the IGCC Statutes.

CONCLUSION

For all of the reasons set forth above, Excelsior contends that the potential additional issues should not be added to the Order for Hearing in this matter.

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Respectfully submitted,
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