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August 14, 2006

VIA E-MAIL & MESSENGER

The Honorable Steve M. Mihalchick
Office of Administrative Hearings
Suite 1700
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PUBLIC VERSION
TRADE SECRET DATA
HAS BEEN EXCISED

Re: In the Matter of a Petition by Excelsior Energy Inc. for Approval of a Power Purchase Agreement Under Minn. Stat. § 216B.1694, Determination of Least Cost Technology, and Establishment of a Clean Energy Technology Minimum Under Minn. Stat. § 216B.1693
MPUC Docket No.: E-6472/M-05-1993
OAH Docket No.: 12-2500-17260-2

Dear Judge Mihalchick:

Enclosed for filing, please find the original of Xcel Energy's Statement of the Case in regards to the above-referenced docket.

By copy of this letter, all parties on the attached service list have been served with same. Thank you.

Very truly yours,

BRIGGS AND MORGAN, P.A.

Michael C. Krikava

Michael C. Krikava

MCK/rlh
Enclosures
cc: The Service List

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE
MPUC Docket No. E-6472/M-05-1993
OAH Docket No. 2500-17210

Roshelle Herstein of the City of Crystal, County of Hennepin, State of Minnesota, says that on the 14th day of August, 2006, she served Xcel Energy's Statement of the Case upon the people listed upon the attached service list via U.S. Mail and e-mail.

Roshelle L. Herstein

Subscribed and sworn to before me this
14th day of August, 2006.

Notary Public

KIMBERLY ANN GANSKE
Notary Public
Minnesota
My Commission Expires January 31, 2010

1905015v5

SERVICE LIST

IN THE MATTER OF THE PETITION OF EXCELSIOR ENERGY INC. AND ITS WHOLLY-OWNED SUBSIDIARY MEP-1, 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

MPUC DOCKET NO. E-6472/M-05-1993
OAH DOCKET NO. 12-2500-17260-2

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IN THE MATTER OF THE PETITION OF EXCELSIOR ENERGY INC. AND ITS WHOLLY-OWNED SUBSIDIARY MEP-1, 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

MPUC DOCKET NO. E-6472/M-05-1993
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Public Version
Trade Secret Data Has Been Excised

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

IN THE MATTER OF A PETITION BY EXCELSIOR ENERGY INC. FOR APPROVAL OF A POWER PURCHASE AGREEMENT UNDER MINN. STAT. § 216B.1694, DETERMINATION OF LEAST COST TECHNOLOGY, AND ESTABLISHMENT OF A CLEAN ENERGY TECHNOLOGY MINIMUM UNDER MINN. STAT. § 216B.1693	PUC Docket No. E6472/M-05-1993 OAH Docket No. 12-2500-17260-2 **XCEL ENERGY'S STATEMENT OF THE CASE**

OVERVIEW

Pursuant to the Administrative Law Judges' Second Prehearing Order in this proceeding, Northern States Power Company, a Minnesota corporation, doing business as Xcel Energy, respectfully submits this Statement of the Case. [1]

Excelsior Energy Inc. seeks approval of a 603-MW power purchase agreement ("PPA") to be supplied by its Mesaba Unit 1. Consequently, Minn. Stat. § 216B.1693 (the clean energy technology statute) governs this proceeding. As directed by that statute, the key issues of this proceeding are whether Excelsior has met its burden of proving that: (1) the Mesaba Unit 1 is or is likely to be a least-cost resource, and (2) whether the supply of energy from this project is in (or is not contrary to) the public interest.[2] In addition, Excelsior must establish that the project company, MEP-I LLC,

[1] Given Excelsior's proposal to bifurcate the proceeding into two phases addressing two different IGCC plants and PPAs, we have limited this Statement to the issues posed by the first phase of this proceeding. Although the schedule does not contemplate a statement of the case in phase 2, it may be useful.

[2] Xcel Energy does not believe there is any significant difference between a "public interest" and a "not contrary to the public interest" standard.

is an innovative energy project and that the PPA provides generation services from a qualifying clean energy technology.

Contrary to Excelsior's claims, Minn. Stat. § 216B.1694, subd. 2(a)(7) does not apply. This statute explicitly limits consideration to a "450 MW" PPA to fall within its terms. Excelsior does not seek approval of a 450 MW PPA, Excelsior exclusively seeks approval of a 603 MW PPA; thus, its claims of "entitlement to a power purchase agreement"[3] with Xcel Energy under that statute are without merit.

ISSUES OF THE PROCEEDING

In light of the applicable statute (Minn. Stat. § 216B.1693), the Administrative Law Judges' Report should address the following:

1) Whether Mesaba Unit 1 generation meets the definition of a "clean energy technology."

2) Whether under the proposed PPA, Mesaba Unit 1 "is or is likely to be a least-cost resource."

3) Whether Mesaba Unit 1 meets the definition of an "innovative energy project."

4) In the event all of the above conditions are satisfied, whether supply of at least two percent of electric energy to retail customers is in the public interest (including consideration of how the 603-MW PPA ties to the two-percent threshold).[4]

---

[3] *See* Excelsior Statement of the Case at 3.

[4] As a provision of Minnesota law, the "two percent of the electric energy provided to retail customers" clearly refers only to Minnesota retail customers. Thus it would be inappropriate to base that figure on NSP's entire system energy production (as Excelsior appears to be proposing). Based upon a preliminary analysis, the energy Excelsior proposes delivering under this 603 MW PPA would be the equivalent of approximately 8% of Xcel Energy's Minnesota retail energy needs in 2012 (the first full year Mesaba Unit 1 would be in service), with energy delivery increasing to a level equivalent to roughly 12% of the Company's retail needs in 2015 (when Mesaba Unit 1 has reached its likely optimum operational capability.).

A full and complete evidentiary record and recommendation on each of these issues will facilitate the Commission's decision in this case. Excelsior bears the burden of proof on each of these statutory elements.

DISCUSSION

A. Applicability of Minn. Stat. § 216B.1693

1. *Threshold Findings Required*

As a third-party vendor, Excelsior must first demonstrate that the Mesaba Unit 1 PPA offers a least-cost resource (or a likely to be least-cost resource) because the PPA is the vehicle for delivering the resource to Xcel Energy. Administrative Law Judges and the Commission routinely apply this public interest standard to proposals for both large energy facilities and PPAs through well-known regulatory processes that assess the cost, reliability, and environmental impacts of a proposal. Under the clean energy technology statute, these same determinations must be made. Excelsior therefore must prove that the Mesaba Unit 1 PPA results in a "least cost resource" as that term is defined by the statute and Commission standards.

Excelsior also bears the burden of proving that its Mesaba Unit 1 PPA is in the public interest. To this end, Excelsior notes that Xcel Energy is interested in the potential of IGCC technology. Excelsior Statement of the Case at 13-14. However, our interest in the technology and its long-range development potential does not translate into Excelsior satisfying its burden of proof in this regard.[5] To the contrary,

[5] Excelsior has characterized Xcel Energy statements about IGCC technology as supporting its proposed Mesaba Unit 1 PPA. Excelsior's Statement of that Case at 13. This appears to be an attempt to suggest that any opposition by Xcel Energy to the PPA can be attacked pursuant to Minn. R. Evidence 806 as inconsistent with a party-opponent admission under Minn. R.. Evidence 801(d)(2). The cited statements by Xcel Energy plainly do not constitute any admission under the Rules of Evidence on any issue relevant to this case. Excelsior's characterizations of the statements miss the point of its obligation in this proceeding. This case is not about Xcel Energy's (or any other company's (e.g. AEP, Cinergy) or the State's) interest in IGCC

Excelsior must prove that its Mesaba Unit I PPA is consistent with the public interest (including cost and risk to ratepayers), as defined by the Commission.

Finally, this proceeding requires a finding that MEP-I LLC is an innovative energy project pursuant to subdivision (b). Minn. Stat. § 216B.1693 separates the clean energy technology determination from the issue of whether an innovative energy project should supply that clean energy. Under the statutory framework, it would be entirely possible to find that IGCC is a clean energy technology, but that the Mesaba Unit 1 PPA is contrary to the public interest.

Thus, this case must assess whether Excelsior has met its burden of establishing that the Mesaba Unit 1 PPA is or is likely to be a least-cost resource, is in the public interest, is a clean energy technology and is an innovative energy project. To prevail, Excelsior must prove its Mesaba Unit 1 PPA is in the public interest as well as each of the required elements under the statute.

2. *Additional Required Findings*

a. Clean Energy Technology Findings.

The clean energy technology statute specifies a number of other findings required in this proceeding. First, Minn. Stat. 216B.1693(c) defines clean energy technology as [i] using coal as its primary fuel in [ii] a highly efficient combined-cycle configuration with [iii] a significant reduction in certain enumerated emissions as compared to traditional technologies. Excelsior therefore must prove that the generation provided pursuant to the Mesaba Unit 1 PPA satisfies this definition. Notably, the definition does not reference carbon sequestration potential. While Excelsior asserts that its compliance with this definition is "not open to debate," such

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technology. This case is about whether Excelsior can meet its burden of proving that this particular IGCC project - Mesaba Unit 1 - is the right resource for our system and that it is in the public interest for Xcel Energy ratepayers to pay for the energy it generates under its filed PPA. That determination has much less to do with IGCC technology than it does with the Mesaba Unit 1 PPA.

assertions have no legal weight. Excelsior Statement of the Case at 10. Conclusory affidavits submitted by a party are insufficient evidence to satisfy that party's burden of proof. *See Conlin v. City of St. Paul*, 605 N.W.2d 396, 402-03 (Minn. 2000). Rather, Excelsior bears the burden of proving its compliance with this statutory definition through competent and admissible evidence establishing each component of this definition.

Thus, first, Excelsior must prove that coal[6] will be its primary fuel in order to comply with this statutory requirement. While the plant's ability to utilize natural gas has been touted by Excelsior, the unrestricted use of natural gas could turn this plant into a very expensive combined-cycle gas plant that neither meets the requirements of this statute nor satisfies the "likely to be least cost" requirements or the required public interest test. Excelsior must prove that, under the PPA, natural gas will not be utilized as the primary fuel for the plant.

b. Innovative Energy Findings.

Second, Excelsior must establish that MEP-I LLC is an innovative energy project as defined by Section 216B.1694, subd. 1. Although the statutory definition of an innovative energy project is similar to that of a "clean energy technology," the definitions and requirements are not identical. Thus, Excelsior must demonstrate that it meets these definitions and establish that it is "innovative generation."

c. Transmission Cost and Plan.

Third, Section 216B.1693 requires Excelsior to establish that its PPA "is or is likely to be a least cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary." Minn. Stat. 216B.1693(a) (emphasis

[6] It is unclear whether this restriction is intended to distinguish coal and coke and the statute provides no explicit guidance. Depending on the record, this may be a legal issue that needs to be addressed in the hearing and in post-hearing briefs.

added). This provision requires consideration of the total, delivered costs to ratepayers, rather than just the isolated costs of Mesaba Unit 1 resulting from the PPA. It specifically requires consideration of whether the Mesaba Unit 1 generation is in the right place for the system it seeks to serve, the costs of ancillary services, the costs of other generation and transmission upgrades, and the costs of other infrastructure needed to support the project. Excelsior will need to prove that – even considering these costs -- it meets the least-cost and public interest criteria specified in the statute.

Excelsior may not assume away those costs or leave them for other parties or entities to define. Because Excelsior proposes two independent sites, it must provide such evidence for both sites. (Notably, at the Commission's July 27, 2006 agenda meeting, Excelsior committed to supplement the record with cost data of this type for both the East Range and West Range proposed sites.)

Excelsior has not proposed a plan for meeting its statutory requirements of ensuring that the project is least cost, including the cost of transmission delivery and other required infrastructure. Indeed, Excelsior's application substantially ignores this statutory element and appears to suggest that the transmission component will be addressed outside of this proceeding. Excelsior must prove that a 603 MW plant constructed in northern Minnesota is a least cost resource including the costs of that power to Xcel Energy's customers (with system load primarily in the Twin Cities) as well as other ancillary services and other generation and transmission upgrades necessary to deliver the power from the plant to Xcel Energy's load.

Indeed, the statutes were drafted to give Excelsior the tools necessary to develop the transmission associated with its generation project. Clearly the legislature intended Excelsior to be responsible for the transmission infrastructure associated with delivery from its generation. That information should be available to the Administrative Law Judges and the Commission for consideration. Excelsior has not

provided it. Likewise, to the extent Excelsior's failure results in delays, it must reconcile those delays with its proposed in service date.

Excelsior's failure to account for the transmission aspects of its project also impact the timing of its project. Under Minn. Stat. § 216B.1694, subd. 2(a)(1) and (3), only an innovative energy project may condemn property for the routing and construction of large transmission facilities associated with its project without obtaining a certificate of need first. This statutory benefit is limited to the entity that satisfies the requirements of an "innovative energy project." The Legislature did not grant that authority to Xcel Energy or any other entity. If other utilities are required to build the transmission infrastructure, instead of Excelsior, they will be required to obtain certificates of need from which Excelsior is exempt. Presumably, this will require a significant delay in Excelsior's proposed schedule.[7]

d. Hedged and Predictable Cost.

Fourth, Excelsior must prove that Mesaba Unit 1 "is a project capable of offering a long-term supply contract at a hedged, predictable cost."[8] Based on the **[TRADE SECRET BEGINS TRADE SECRET ENDS]** it is unclear how Excelsior will prove that the **[TRADE SECRET BEGINS TRADE SECRET ENDS]** is either "hedged" or at a "predictable cost." Significant elements of the **[TRADE SECRET BEGINS**

[7] It is well-established that an entity may not redelegate or transfer its eminent domain authority to another to exercise. 6A William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 2905; *see also, e.g., Ruddock v. City of Richmond*, 178 S.E. 44, 47 (Va. 1935) (the grantee of the power of eminent domain cannot surrender, transfer, or redelegate to another unless expressly authorized to by the statute conferring such power); *City of Spokane v. Spokane & I.E.R.* Co., 135 P. 636, 639 (Wash. 1913) (holding that a city cannot delegate its power of eminent domain to a railroad company).

[8] The statute requires the project developer or owner to "certify" these facts. Minn. Stat. § 216B.1694, subd. 1(2). Excelsior must establish a record that proves, by a preponderance of the evidence, its certification of Mesaba Unit 1's ability to offer a long-term PPA with a hedged, predictable price for the life of the project.

TRADE SECRET

ENDS] Excelsior bears the burden to establish its PPA pricing will result in "hedged" and "predictable" costs to ratepayers. If due to the **[TRADE SECRET BEGINS** **TRADE SECRET ENDS]** it is unable to prove these two statutory elements, then the claim that Mesaba constitutes an innovative energy project fails.

e. Other Statutory Requirements.

Fifth and finally, Excelsior must prove that it meets the enumerated IRRRB designation requirements in subdivision 1(3) of the innovative energy project definition.[9] Excelsior has provided insufficient information about the IRRRB designation process for review of its substance, its legality or its relation to the public interest given the Public Utilities Commission preference for competitive acquisition of resources. If nothing else, as part of the public interest review process, the extent to which the statues have been interpreted by the IRRRB as a grant to a private corporation of a special or exclusive privilege, immunity or franchise is relevant.

In addition to these requirements specified by Minn. Stat. 216B.1693, Xcel Energy recognizes that the Commission may elect to consider the five public interest criteria of Section 216B.1694, subd. 2(a)(7) when making its public interest determination. While Minn. Stat. 216B.1693 does not require it, the Commission

[9] It is unclear from the IRRRB correspondence or from Excelsior's petition whether the designation process was (or is) open to multiple parties or limited to Excelsior as the only entity capable of satisfying the requirement. The statutes under which Excelsior is proceeding create a number of significant legal and constitutional questions. This may not only be a constitutional issue pursuant to Minn. Const. Art. XII §1(*see Visina v. Freeman*, 89 N.W.2d 635, 651 (Minn. 1958) (while one alone may constitute a permissible class subject to legislation, the fewer the members of the class the closer the courts scrutinize the legislation to determine if it constitutes a special law in violation of the Constitution)), but also is relevant to the Commission's public interest determination given the Commission's preference for competitive acquisition processes, and the need to find an exemption from its resource bidding and acquisition Orders. Assuming without accepting that the law is constitutional, it is also unclear how MEP-I LLC can have received the prior financial support required under the statute.

could certainly undertake such an evaluation in light of the Legislature's clear interest in the criteria.

B. Excelsior's Claims

Excelsior argues that the Legislature has already determined that the public interest supports construction of Mesaba Unit 1. Excelsior Statement of the Case at 4. Excelsior asserts that the Commission must approve its Mesaba Unit 1, 603-MW PPA upon 1) considering the five criteria established by the Legislature to be applied to a 450-MW PPA under Minn. Stat. § 216B.1694 subd. 2 (a)(7); and then 2) making a cursory determination that the remaining 153 MWs of Mesaba Unit 1 is or is likely to be a least cost resource under Minn. Stat. 216B.1693. *Id.* at 4-5.

Excelsior's view misapplies the relevant statutes. Excelsior proposes a 603-MW PPA as opposed to the 450-MW PPA specified by Minn. Stat. 216B.1694. Excelsior's attempt to split up and layer its proposed PPA by segments into both statutes fails; there is no offer of a 450-MW contract as provided for in Minn. Stat. 216B.1694, subd. 2 (a)(7), thus that provision does not govern this proceeding. Excelsior's view that it is "entitled to enter into a contract with a public utility that owns a nuclear generation facility" under this statute is mistaken. Subdivision 2(a)(7) provides that an innovative energy project:

> (7) shall be entitled to enter into a contract with a public utility that owns a nuclear generation facility in the state to provide 450 megawatts of baseload capacity and energy under a long-term contract, subject to the approval of the terms and conditions of the contract by the commission. The commission may approve, disapprove, amend, or modify the contract in making its public interest determination, taking into consideration the project's economic development benefits to the state; the use of abundant domestic fuel resources; the stability of the price of the output form the project; the project's potential to

> contribute to a transition to hydrogen as a fuel resource; and the emission reductions achieved compared to other solid fuel baseload technologies; (emphasis added).

Excelsior has failed to propose a 450-MW contract pursuant to this statutory provision.[10] Indeed, Excelsior has explicitly disclaimed any 450-MW project, has refused to offer this statutory product, and has declined to provide a pricing structure for a 450-MW proposal.

As a result of Excelsior's failure to present a 450-MW contract for the Commission's consideration, Section 216B.1694, subd. 2(a)(7) does not by its own terms apply to this matter. There is no ambiguity in the statute's language upon which to argue that the statute provides for *more than* 450 MWs of base load capacity and energy. The Legislature is certainly capable of clearly stating when an amount specified in a statute is a minimum amount that can be exceeded, and has not done so here. Excelsior cannot claim that the Commission is free to "read into" the statute words or meanings that are not there. Minn. Stat. § 645.16 (when words of a law are clear and free from ambiguity, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); *see also, e.g., Vlahos v. R&I Constr. Of Bloomington Inc.*, 676 N.W.2d 672, 681 (Minn. 2004) (holding that when construing the meaning of a statute, "[w]e will not supply words that the legislature either purposely omitted or inadvertently left out. Instead we apply the plain meaning of the words of the statute") (emphasis added). Given the plain, unambiguous language of the statute, the Commission would be acting outside its statutory authority to accept Excelsior's invitation to evaluate and approve its 603 MW PPA under the provisions of Section 216B.1694, subd. 2(a)(7).

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[10] This eliminates the need to address the various legal issues associated with Excelsior's claims regarding how the elements of Minn. Stat. § 216B.1694, subd. 2(a)(7) should be interpreted (claims which we do not accept).

C. Burden of Proof

Excelsior bears the burden of proving all facts necessary for the Commission to direct the Company to enter into the contract. Minn. R. 1400.7300, subp. 5 ("The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence"). Excelsior must demonstrate that the testimony and evidence it has introduced into the record, when weighed against all of the other record evidence, supports an affirmative determination on each of the four issues posed by Minn. Stat. 216B.1693. Thus, where Excelsior fails to develop competent, admissible evidence sufficient to prove an issue by a preponderance of the evidence, its proposal must fail. Minn. R. 1400.7300, subp. 5. Where Excelsior fails to provide sufficient record evidence to fully consider an issue on the merits, its proposal likewise fails. *Id.* This is no different than where a utility seeking a certificate of need must first satisfy the Commission that its application is "complete" as a prerequisite to even attempting to satisfy its burden of proof. *E.g., In the Matter of the Application of Northern States Power Company for a Certificate of Need to Increase the Capability of its Black Dog Generating Facility,* ORDER ACCEPTING FILING, at 2 (Feb. 24, 2000) (a finding that a filing is complete means only that it is "sufficient to begin the period for considering the merits of the filing" not that the applicant has satisfied the ultimate burden of proof). This well-known regulatory standard applies to the current proceeding with equal force.

Much of what Excelsior has filed to date is insufficient as evidence to meet its burden. For example, its two-volume "compendium" does not constitute competent evidence a decision maker may rely on in determining whether the threshold requirements of Minn. Stat. 216B.1693 are met. While Xcel Energy respects the support voiced by various state and local political leaders, Excelsior may not rely on these "testimonials" to meet its evidentiary burden here. *See* Excelsior Petition § VII

at 10-12. The Legislature has passed specific statutes that govern the determination of the issues in this case. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. Where the words of a stature are free from ambiguity, a decision maker may not disregard "the letter of the law . . . under the pretext of pursuing the spirit."[11] *Id.*

Likewise, many of Excelsior's claims regarding the future of "clean coal" and the Department of Energy's studies and plans amount only to circular citations establishing that the DOE has an interest in IGCC coal plants. *See* Excelsior Petition § VII at 13. These do not constitute evidence of how Excelsior's proposed project meets the statutory requirements.

While Excelsior bears the burden of proof in this case, Xcel Energy plans to file testimony and introduce evidence to assist in developing the record on these issues. We will also offer testimony regarding concerns over the Mesaba Unit 1 PPA structure, the transaction structure implications for Xcel Energy, and the necessary regulatory treatment as a result of those implications, which need to be considered as part of the overall public interest consideration.

OTHER RELATED ISSUES

There are a number of other, related requirements that Excelsior is or may be required to address. Excelsior's filing is vague and speculative as to how it intends to address such requirements. For example, Minn. Stat. §216B.1694, subd. 2 (a)(6)

[11] Indeed, a decision maker may only go beyond the words of a statute to consider the legislative record of the statute's enactment when the wording of the statute is ambiguous. *Id.*; *Gerber v. Gerber*, 714 N.W.2d 702, 704 n.2 (Minn. 2006) (Minn. Stat. § 645.16 "only allow[s] inquiry into legislative intent where the words of the law are ambiguous"). Thus, statements from various individuals and groups that evidence their interpretation of the statutory requirements Excelsior must meet, or their opinion regarding whether Excelsior has met the legislative intent behind those requirements, are not competent, admissible evidence in this matter. *See In re State Farm Mut. Auto. Ins. Co.*, 392 N.W.2d 558, 568-69 (Minn. Ct. App. 1986) (legislative testimony after enactment of a statute is not competent, admissible evidence of legislative intent).

requires a "good faith effort" to conduct a carbon sequestration demonstration. Likewise, Minn. Stat. §216B.1694, subd. 2(a)(3) treats the project as a utility for limited circumstances and requires the project to report any intent to exercise eminent domain authority. Excelsior's filing is substantially incomplete as to whether it will be filing such a report or whether it intends to exercise such authority. Further, it is unclear how Excelsior will participate in the state transmission plan effort pursuant to Minn. Stat. §216B.2425. Obviously any entity like Excelsior who has eminent domain authority to develop transmission in this State needs to participate in the transmission planning processes set forth by the Commission. Excelsior falls within the definition of "transmission company" under Minn. Stat. § 216B.02, subd. 10, as well as a "utility" under Minn. Stat. § 116C.52 subd. 10 for specified purposes, and yet the application is silent on how Excelsior intends to meet its various obligations arising from its legal status. Although Excelsior has not properly proceeded under Minn. Stat. §216B.1694, subd. 2 (a)(7), it must satisfy the requirements of subd. 2 to qualify as an innovative energy project.

While these issues may not be directly on point to the Commission's evaluation of the reasonableness of the proposed Mesaba Unit 1 PPA, they are important to the overall assessment as to whether the project is viable and comports to all of the requirements of Minnesota Law.

CONCLUSION

Excelsior's actual proposal determines the applicable statute and standard for review in this proceeding. Because Excelsior proposes a 603-MW PPA, Minn. Stat. § 216B.1693 regarding clean energy technology governs. The Administrative Law Judges and the Commission should reject Excelsior's argument that Minn. Stat.

§ 216B.1694 governing approval of a 450-MW innovative energy project contract applies in this case.

Excelsior bears the burden of proving the facts required by statute for Commission approval of its proposed PPA. Given the lack of specificity and certainty in the pricing and terms of the proposed PPA, Xcel Energy believes there will be challenges to building the record to prove all the necessary statutory elements. We intend to assist in the development of the record, highlighting those areas where we believe the record is not sufficient to support the findings necessary for approval of the PPA Excelsior has proposed.

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Respectfully submitted,

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