

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE  
MINNESOTA 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, and Determination of Least  
Cost Technology and Establishment of a Clean Energy  
Minimum Under Minn. Stat. §216B.1693.

MPUC Docket: E/6472/M-05-1993

OAH Docket: 12-2500-17260-2

**mncoalgasplant.com's NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT**

Please take notice that mncoalgasplant.com brings this Motion for Partial Summary Judgment in the above-entitled matter based on Minn. R. 1400.6600 and Minn. R.Civ.P. 56.01. This Motion is based on the attached Memorandum of Law, Affidavit and Exhibits submitted with this Motion, and all the files, records and proceedings herein, arguments of counsel at the hearing. Responsive pleadings are due within seven days by prior Order in this docket.

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

As a matter of law, Excelsior's Petition for a Power Purchase Agreement must be denied with respect to the "West site" because it does not meet the requirements of Minn. Stat. §216B.1694, Subd. 1(3) and is not an Innovative Energy Project. Because the West site is not an Innovative Energy Project, Excelsior is not entitled to the Power Purchase Agreement that is based on a project on the West site. There is no material issue of fact. No party claims there is infrastructure of any type on the west site. Excelsior's Petition for a Power Purchase Agreement based on its proposed Mesaba Project on its preferred West site must be denied.

As set forth by XII Intervenors, as if fully related here, Summary Judgment is appropriate where there is no genuine issue of material fact and where as a matter of law, a party is entitled to judgement. Minn. R. Civ. P. 56.03. See also Anderson v. Liberty Libby, Inc., 477

U.S. 242, 247-248 (1986). Excelsior has no basis in law to claim entitlement to a Power Purchase Agreement regarding its proposed Mesaba Project at the West site.

**II. AS A MATTER OF LAW, EXCELSIOR'S WEST SITE IS NOT AN "INNOVATIVE ENERGY PROJECT" AND IS NOT ENTITLED TO A POWER PURCHASE AGREEMENT.**

To be entitled to a Power Purchase Agreement, Excelsior's Mesaba Project proposal must meet the definition of "Innovative Energy Project." It does not -- as a matter of law, Excelsior's preferred "West site" is not an "Innovative Energy Project" as defined by the statute because there is no infrastructure whatsoever on the "West site." Minn. State. §216B.1694, Subd. 1(3). Further, Excelsior knew or should have known that the Certification by the IRR Commissioner was false and fraudulent. There is no material issue of fact regarding whether there is "adequate infrastructure to support new or expanded development" -- there is no infrastructure on site. As a matter of law, the Petition for a Power Purchase Agreement must be dismissed as regards the proposed West site. Excelsior is not entitled to a Power Purchase Agreement based upon a project on the West site.

**A. THE MESABA LEGISLATION DEFINES AN INNOVATIVE ENERGY PROJECT AS ONE LOCATED ON A SITE WITH INFRASTRUCTURE**

The law governing Excelsior's Mesaba project was passed in the 2003 Special Session attached to the Prairie Island bill.<sup>1</sup> The relevant statutory provision is Minn. Stat. § 216B.1694:

**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.

<sup>1</sup> 2003 Special Session, Chap. 11, S.F. 9:

[http://ros.leg.mn/bin/getpub.php?pubtype=SLAW\\_CHAP&year=2003&session\\_number=1&chapter=11](http://ros.leg.mn/bin/getpub.php?pubtype=SLAW_CHAP&year=2003&session_number=1&chapter=11)



## B. THERE IS NO DISPUTE OF MATERIAL FACTS

Excelsior must propose a project that meets the requirements of an “Innovative Energy Project” in order to receive the regulatory benefits provided by the statute. Under the statute, above, which sets out the requirements of an “Innovative Energy Project,” the third criteria requires:

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.

Minn. Stat. §216B.1694, Subd. 1(3)(emphasis added). There is no factual dispute that the Commissioner of the Iron Range Resources designated both sites proposed as required by statute. On November 7, 2005, Sandy Layman, Commissioner of IRR, wrote to Excelsior’s Tom Micheletti, stating:

Based on this Agency’s ongoing efforts in support of the Mesaba Energy Project and the Analysis of Agency staff of the proposed site near Taconite, Minnesota (the “Preferred Site”) and alternative site near Hoyt Lakes, Minnesota (the “Alternative Site”) for two units of the Mesaba Energy Project, I hereby designate the Mesaba Energy Project as one that meets the requirements set forth in Minnesota Statutes, Section 2156B.1694(sic), Subdivision 1, Paragraph3, whether it is located at the Preferred Site or the Alternative Site.

Exhibit B, Letter to Micheletti, Nov. 7, 2005. However, based on evidence within Excelsior’s application, this designation is patently false.

The West site does not have infrastructure – there is no material issue of fact – no parties are claiming there is adequate infrastructure on site. According to the Excelsior Report, “The site is currently undeveloped and unoccupied...” Excelsior Report, Project Description, Section IV, page 10. The West site project is not “on a site that has substantial real property with adequate infrastructure to support new or expanded development.” Excelsior’s Petition Report, Section IV, Project Description, includes maps such as Figure 9 show the lack of infrastructure and with “infrastructure requirements” drawn in. There is no pre-existing item labeled on the map other than “wetlands.” Exhibit A, Figure 9.

- Rail – there is none. Figure 9 shows rail that Excelsior proposes to be built.
- Road – there is none. Figure 9 shows road that Excelsior proposed to be built.
- Transmission – there is none. Figure 9 shows transmission that Excelsior proposed to be built.
- Natural gas pipeline – there is none. Figure 9 shows gas pipeline that Excelsior proposed to be built.

- Process Water and Discharge – there is none. Figure 9 shows Process water infrastructure that Excelsior proposed to be built.
- Sanitary Sewer & Potable Water – there is none. Figure 9 shows Sanitary Sewer and Potable Water that Excelsior proposed to be built.

Xcel questioned the designation by the IRR Commissioner. Exhibit C, Letter from IRR to Clark. The IRR could not specify any infrastructure on site, and notes that:

- Rail must be built to the plant, the nearest rail is parallel to U.S. Hwy. 169 (no distance given, see map).
- Gas pipeline must be built to the plant 13 miles south of the plant.
- Transmission must be built from the plant to Blackberry substation 20 miles south.
- Water must come from Canisteo Pit (no distance given, see map).
- Wastewater must be treated in the Taconite/Bovey treatment system (no distance given, see map)
- Nearest road is U.S. Hwy. 169 and County Highway 7 (no distance given, see map).

IRR staff participated in a DOE site visit in June, 2005, and provided photos of the site in response to Data Practices requests. Exhibit E, U.S. DOE Site Visit (selected) In the photo below, the site is beyond the trees:



6/8/2005  
Mesaba Trip 09.jpg

This is another photo that was taken walking the site, and there is obviously no infrastructure:



6/8/2005  
Mesaba Trip 07.jpg

Because there is no existing infrastructure, Excelsior proposes that infrastructure be built. For example, in an SEH Public Infrastructure Improvement Study, Excelsior proposes \$55,000,000 in infrastructure be built, at public expense! Exhibit F, SEH Public Infrastructure Improvement Study. In this study, there are maps and cost estimates for Predesign, Predesign (completed), Design/Permitting, Construction, ROW Acquisition, Wetlands Mitigation, Construction Administration for:

- EE Proposed Rail Alt 1-A
- EE Proposed Roads
- EE Proposed Gas Alignment
- EE Proposed Sewer and Water

Itasca County submitted a Capital Budget Request for this “EE Proposed” “infrastructure which will enable the construction and operation of the Mesaba Energy Project...” Exhibit G, Itasca County, Capital Budget Request, Public Infrastructure to support new power plant in Itasca County.

In addition to the above infrastructure needs, there is also no transmission infrastructure. Excelsior’s Direct Testimony and available public information shows it is a costly item. Excelsior’s Report states West Range Site estimates for Mesaba are \$18.4 million for Generator Outlet and \$75 million for Network Upgrades, totaling \$93.4 million. Excelsior Report, Section IV, p. 89-90. This is a floor, as Xcel’s Gonzalez’ Direct Testimony states it will be more. However, the construction of a power plant where there is no existing transmission infrastructure is problematic. The transmission studies have shown that costs will be much higher than estimated because even with the fixes required, the electricity is not deliverable, and to make it deliverable, extensive network system upgrades will be necessary. See Exhibit H, Excelsior Update for NM-SPG, presented August 16, 2006 (noting that both West and East site failed deliverability tests); Exhibit I, G519 MISO System Impact Study, June 2006 (to interconnect, 675MW of wind must be cut, Big Stone II generation must remain in North Dakota, Minnesota Power generation must be cut, and the capacity of the Arrowhead transmission line must be cut).



Excelsior further admits the extent of infrastructure necessary in its OSBL Estimate, which lists rough costs categorized in "Site Prep," "Transportation," "Transmission," Process water: Supply/Intake, Water Conveyance, Cross Tie to Holman Lake, Outfall 002, Phase I Water supply, Outfall 001, Wetland Impacts, ROW, Other OSBL." Exhibit I, OSBL Estimate – West Range (PUBLIC). Though cost is at issue, the lack of infrastructure on site is not.

There is no material issue of fact regarding presence of infrastructure – all parties agree there is no infrastructure. An Innovative Energy Project must have adequate on-site infrastructure.

### III. CONCLUSION

Excelsior's "West site" for its Mesaba Project is not an "Innovative Energy Project" as defined by statute. There is no issue of material fact. As a matter of law, Excelsior's Petition must be denied regarding the West Site.

Dated: September 25, 2006

  
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