

**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

**MCGP MOTION JOINING XCEL'S MOTION TO ENFORCE PROTECTIVE ORDER
CONCERNING TRADE SECRET DESIGNATIONS**

I. INTRODUCTION

mncoalgasplant.com (hereinafter "MCGP") hereby moves and joins in Xcel's Motion to Enforce Protective Order. Excelsior's designations are overbroad and it is applying the Protective Order arbitrarily. Mncoalgasplant.com again makes the same arguments as made in the previous Motion, incorporating its Memorandum of June 20, 2006, as if fully reiterated here – nothing has changed – the provisions of the Protective Order are contrary to caselaw and administrative rules governing discovery.

Excelsior, as the party wishing to restrict disclosure of Trade Secret information, has the burden to demonstrate "good cause," and Excelsior has failed to do so. Instead, it has arbitrarily deemed as "non-public" information of the types that are public in other proceedings; Excelsior has violated the Protective Order by limiting access to some, such as mncoalgasplant.com; and on the other hand, Excelsior has violated the Protective Order by turning over "Protected" information, disregarding the clear procedure in the Order for disclosure contrary to the Order!

Mncoalgasplant.com joins Xcel in requesting that the ALJ a) require that Mesaba 1 LLC adhere to the Protective Order, b) require written justification for each claim of trade secret, and c) order disclosure of data that is not adequately justified. Further, mncoalgasplant also asks that Meaba 1 LLC and MCEA be ordered to comply with Paragraph 3 of the Protective Order, which sets out the process for treatment of parties other than as required by the Protective Order.

II. EXCELSIOR HAS NOT DEMONSTRATED GOOD CAUSE FOR PROTECTED STATUS

Excelsior, as the party wishing to restrict disclosure of Trade Secret information, has the burden to demonstrate “good cause,” and Excelsior has failed to do so. Mncoalgasplant.com and Xcel have outlined the caselaw and rules regarding “non-public” and “Trade Secret” designations. With the blessings of the overbroad Protective Order in this case, Excelsior has failed to demonstrate good cause to restrict access to information. The burden is improperly shifted the burden to those seeking necessary information. Excelsior has deemed as “non-public” information that is public in other proceedings, such as cost information. Excelsior has violated the Protective Order by applying it arbitrarily – by previously limiting access to some, such as mncoalgasplant.com, by unreasonably designating data as “non-public,” and on the other hand by blanketly turning over “Protected” information without having received an information request and despite a clear procedure in the Order for disparate treatment! Thankfully, Xcel is also struggling with Excelsior’s unreasonable and overbroad designations!

A. EXCELSIOR, AS THE PARTY SEEKING TO LIMIT DISCOVERY, HAS THE BURDEN TO DEMONSTRATE GOOD CAUSE IF IT WANTS DOCUMENTS DESIGNATED AS PROTECTED.

As Xcel argues, the party seeking to limit discovery and utilize a Protective Order must demonstrate good cause. There is a presumption to require disclosure, and courts favor discovery and disclosure over secrecy. The need for secrecy must be demonstrated by the party seeking the restriction:

[C]ourt proceedings and documents enjoy a “presumption of openness” that generally may be overcome only by showing that a party’s constitutional rights would be at risk if the proceeding or document is made public. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 203-04 (Minn. 1986) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 575-81 (1980)); *see also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (“For many centuries, both civil and criminal trials have traditionally been open to the public.”). In civil actions, “[e]ach case involves a weighing of the policies in favor of openness against the interests of the litigant in sealing the record. *In re Rahr Malting Co.*, 632 N.W.2d 572, 576 (Minn. 2001) (citing *Schumacher*, 392 N.W.2d at 202-03).

In the matter of GlaxoSmithKline PLC, 699 N.W.2d 749, 755 (Minn. 2005).

"[I]n order to overcome the presumption in favor of access, a party must show strong countervailing reasons why access should be restricted." Minneapolis Star & Tribune v. Schumacher, 392 N.W. 2d 197, 205-206 (Minn. 1986). Excelsior has the burden and has not demonstrated good cause.

The procedure under which data is protected was set forth in the Protective Order, and Excelsior must comply with the provisions of the "Commission's September 1, 1999 Revised Procedures for Handling Trade Secret and Privileged Data." First Prehearing Order at ¶ 15; Xcel Memorandum, p. 4.

Xcel and MCGP are legitimately seeking access to documents. Excelsior has gone far beyond the specific and narrow designations that would protect Excelsior's interests.

Generally, the burden of demonstrating good cause rests with the party seeking a protective order. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994) (applying Fed. R. Civ. P. 26(c)). But in complex litigation where a document-by-document review of each document produced would be unfeasible, umbrella protective orders are not uncommon. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987) (explaining that umbrella protective orders are designed to encourage and simplify the exchange of large numbers of documents). In cases involving large numbers of documents, the court may put into place an umbrella protective order upon a general showing of good cause by the producing party. *Pansy*, 23 F.3d at 787 n.17. After the documents are produced, an opposing party may indicate which documents, if any, it believes are not entitled to protection, and the burden of demonstrating good cause for each challenged document lies with the party seeking protection.[6] *Id.*; *Alexander*, 820 F.2d at 356; *see also State ex rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 686 (Minn. App. 2000) (stating that "in complex litigation, it is not uncommon to find a blanket or umbrella order protecting documents based on the producing party's good-faith assertion that they are confidential."), *review denied* (Minn. Apr. 25, 2000).

Star Tribune v. Metropolitan Sports Facilities Commission et al., 659 N.W.2d 287, 296-297 (Minn. Ct. App. 2003).

It takes a lot to justify restriction of access.

The supreme court concluded, however, that the common law right of access to inspect public records – i.e. court files – was the proper standard to apply. *Id.* at 205. The common law right of access involves a balancing test in which the "interests supporting access, including the presumption in favor of access, are balanced against the interests asserted for denying access." *Id.* at 202-03. Access should be denied only when the interests asserted in favor of denial are "strong enough to overcome the presumption [for access]." *Id.* at 203.[2]

Bonzel v. Pfizer, Inc., Schneider and Medtronic AVE, Inc., 2002 WL 1902526, at 5 (Minn. Ct. App.).

That necessary balance of interests, though, has not been addressed in this case, no claim of good cause, and no findings regarding specific documents and no detail of the interests of Excelsior.

The administrative procedure to justify protection of a trade secret is established in *Commission Procedures* at ¶¶ 1-2, and as Xcel notes, it is narrowly defined under the statute as data:

- 1) that was supplied by the affected individual or organization, 2) that is the subject of efforts by the individual or organization that are unreasonable under the circumstances to maintain its secrecy, and 3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Minn. Stat. § 13.17, Subd. 1(b); Xcel Memorandum at 4.

Under Minnesota caselaw, the procedure to demonstrate good cause and determine the confidentiality status of documents or terms of a protective order is also well-established :

... in complex litigation where a document-by-document review of each document produced would be unfeasible, umbrella protective orders are not uncommon. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987) (explaining that umbrella protective orders are designed to encourage and simplify the exchange of large numbers of documents). In cases involving large numbers of documents, the court may put into place an umbrella protective order upon a general showing of good cause by the producing party. *Pansy*, 23 F.3d at 787 n.17. After the documents are produced, an opposing party may indicate which documents, if any, it believes are not entitled to protection, and the burden of demonstrating good cause for each challenged document lies with the party seeking protection.[6] *Id.*; *Alexander*, 820 F.2d at 356; see also *State ex rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 686 (Minn. App. 2000) (stating that “in complex litigation, it is not uncommon to find a blanket or umbrella order protecting documents based on the producing party’s good-faith assertion that they are confidential.”), *review denied* (Minn. Apr. 25, 2000).

Star Tribune v. Minnesota Twins Partnership, 659 N.W. 2d 287, 293-294 (Minn. Ct. App. 2000). An umbrella protective order is to provide for disclosure with the assurance that information will be kept confidential, not to restrict access. Conclusory statements, such as Excelsior’s, about fear of consequences of disclosure are not sufficient. See *In re Rahr Malting Company v. County of Scott*, 632 N.W. 2d 572 (Minn. Ct. App. 2001).

The party seeking to protect information has its burden, as does the Court, which must set out sufficient reasons for protective measures:

As the reams of documents sealed in the district court file attest, by allowing the parties to designate basically any and all documents (and all portions thereof) “confidential, the district court did not fulfill its obligation to act as gatekeeper to insure that the protective order did not become overbroad in its application.

Bonzel v. Pfizer, Inc., Schneider and Medtronic AVE, Inc., 2002 WL 1902526, at 5 (Minn. Ct. App.).

The Third Prehearing Order and the Protective Order do not demonstrate the gatekeeping necessary to assure the Protective Order is not overbroad. Instead of focusing on the particular documents and whether they are confidential, and whether a Protective Order is necessary, the Order is a blanket restriction with no demonstration of “good cause” by Excelsior – it is overbroad.

B. EXCELSIOR AND THE ORDER CONFLATE “PUBLIC ACCESS” WITH PARTY ACCESS AND “PUBLIC DISCLOSURE” WITH DISCLOSURE TO FULL-PARTY INTERVENORS BOUND BY PROTECTIVE ORDER.

There is a history in this docket of conflation of “public access” with “party access,” and “public disclosure” with disclosure to parties covered by the Protective Order. In this case, Xcel is arguing that much of the information Excelsior has declared “protected” is information that should be available to the public, and of course the parties too. The law of “protected information” is clear that concern about “public access,” concern about any party’s use of this information, or concern about the adversarial nature of the case is no reason to limit public access to information:

The mere fact that Medtronic is a competitor of the parties and that some of the information necessary to be filed with the court could be of a proprietary and therefore an arguable confidential nature suitable for filing under seal, does not mean that all of the information the parties might not Medtronic to see rises to a level sufficient to overcome the general presumption of access.

Bonzel v. Pfizer, Inc., Schneider and Medtronic AVE, Inc., 2002 WL 1902526, at 5 (Minn. Ct. App.).

There is a general presumption of access. Not wanting to disclose information is not sufficient reason to restrict disclosure. Excelsior must disclose information even if they’d rather the public didn’t know, and Excelsior may well be required to disclose revealing information – that’s the nature of a “contested” case.

For example, Excelsior has improperly designated its response to mncoalgasplant.com’s Information Request “regarding Excelsior’s cost assumptions for infrastructure for the preferred West Range site for the Project.” LSD letter, August 18, 2006. The chart attached, the “Public Version,” is blank, except for categories along the left side: “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," and "Other OSBL." The headings are: "Category," "Description," "Unit," "Quantity," "Unit cost," "Cost Estimate," and "Estimate Basis." Exhibit A, OSBL Estimate – West Range. There is nothing whatsoever in the chart! When Excelsior's lead counsel was asked for an explanation, the response was that it was "Trade Secret" because they, Excelsior, had to get bids on these items.¹ Yet these are many of the very items that are being taken on by local governments! These are many of the items being taken on by the public in Excelsior's shift of infrastructure costs to the public! This information must be public.

In other proceedings, such as the hotly contested Arrowhead-Weston transmission line, in A-W II, a proceeding focused on costs because of the extreme cost increases projected, a hearing was held on cost issues. Cost information was always public, in the application, in the various cost estimates along the way, to the Order received last week showing the "estimated construction costs of \$420,308,000" for the 220 mile long transmission line.² The type of public information included Site Prep costs, access road costs, transmission costs broken down into per mile costs and per unit costs by item such as towers, conductor, shield wire, relays, land acquisition, substation costs, for each individual segment. Exhibit B, Original Arrowhead Application, Volume II, Appendix B Costs, pps. B1-3,4. The application was followed by a Cost Estimate Update Report, Black & Veatch, February 4, 2003; Cost Estimate Update Report, Revision I and Cost Estimate Audit Report, Revision, both Black & Veatch, May 23, 2003; and Independent Cost Review of the Arrowhead-Weston Project, R.W.Beck, July 2003. Exhibit C, Independent Cost Review of the Arrowhead-Weston Project, R.W.Beck, July 2003, p. ES-3,4. Similarly, Xcel's SW Minnesota 345kV proceeding, cost estimates were detailed showing line item costs of transmission improvements necessary "for Buffalo Ridge Generation Outlet." Exhibit D, TLTG Table, SW Minnesota proceeding, Xcel Option 1-H. The Mesaba project generation outlet should be as documented. The Mesaba project, at \$1.97 billion excluding infrastructure, will cost at minimum five

¹ Conversation between Carol A. Overland, attorney for MCGP, and Byron Starns, attorney for Excelsior, August 22, 2006, at Taconite EIS Commerce hearing.

² PSC-WI Order, September 7, 2006, Docket 5-CE-113.

times the cost of the Arrowhead transmission line and SW Minnesota 345kV line, and it's reasonable to expect the same level of detail.

III. EXCELSIOR VIOLATED PROTECTIVE ORDER PARAGRAPH 1(c)(F) AND PARAGRAPH 3.

Excelsior violated the Protective Order, paragraphs 1(c)(F) and 3, by providing "protected information" to MCEA, et al., without the necessary demonstration of need and contrary to the provisions of Protective Order paragraph 3 which sets out the procedure for dissemination of information contrary to the terms of the Protective Order. MCEA's first Information Request was dated August 28, 2006, yet its Statement of the Case submitted August 14, 2006, MCEA, et al., cites "[TRADE SECRET INFORMATION]" to which it should not have been privy under Protective Order, paragraphs 1(c)(F). MCEA did not join the challenge of the restrictions of the Protective Order, and the necessary demonstration of need was not made nor were the procedures required under paragraph 3 utilized. The Protective Order must be equally applied to all parties, and the court ordered provisions of paragraph 3 must be followed by all parties. MCEA must make the requisite showing required by non-utility parties or follow the steps of paragraph 3 to circumvent paragraph 1(c)(F).

IV. CONCLUSION

Mncoalgasplant.com joins Xcel in requesting that the ALJ a) require that Mesaba 1 LLC adhere to the Protective Order, b) require written justification for each claim of trade secret, and c) order disclosure of data that is not adequately justified. Further, mncoalgasplant asks that Excelsior and MCEA be ordered to comply with Protective Order ¶¶ 1(c)(F) and 3.

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