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September 15, 2006

**VIA OVERNIGHT COURIER AND E-MAIL**

Steve M. Mihalchick  
Administrative Law Judge  
Office of Administrative Hearings  
100 Washington Square, Suite 1700  
Minneapolis, MN 55401-2138

Re: In the Matter of Excelsior Energy Power Purchase  
Agreement with Mesaba Energy Project  
MPUC Docket No. E6472/M-05-1993  
OAH Docket No. 12-2500-17260-2

Dear Judge Mihalchick:

Enclosed for filing please find Minnesota Power's Response to Xcel Energy's Motion to Enforce Protective Order in the above-referenced Docket. An Affidavit of Service is also enclosed.

Yours truly,

David R. Moeller

DRM:sr  
Enc.  
c: Service List

STATE OF MINNESOTA     )  
  ) ss  
COUNTY OF ST. LOUIS     )

AFFIDAVIT OF SERVICE VIA  
OVERNIGHT COURIER,  
and E-MAIL

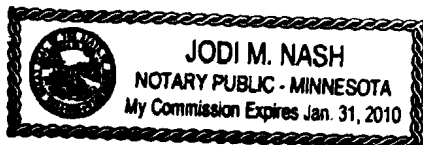
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Kristie Lindstrom of the City of Duluth, County of St. Louis, State of Minnesota, says that on the 15<sup>th</sup> day of September, 2006, she served Minnesota Power's Response to Xcel Energy's Motion to Enforce Protective Order in MPUC Docket No. E6472/M-05-1993 and OAH Docket No. 12-2500-17260-2 to Administrative Law Judge Steve M. Mihalchick via Overnight Mail and Electronic Mail, and the remaining persons on the attached Service List via First Class Mail and Electronic Mail.

*Kristie Lindstrom*  
Kristie Lindstrom

Subscribed and sworn to before  
me this 15<sup>th</sup> day of September, 2006.

*Jodi M. Nash*  
Notary Public



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

**In the Matter of a Petition by Excelsior Energy, Inc.  
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**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**

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

**MINNESOTA POWER'S  
RESPONSE TO XCEL ENERGY'S  
MOTION TO ENFORCE  
PROTECTIVE ORDER**

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Minnesota Power fully supports Xcel Energy's September 5, 2006 Motion to Enforce Protective Order Concerning Trade Secret Designations ("Xcel Energy's Motion") in the above-referenced Docket. Throughout the course of this Docket, Minnesota Power has consistently stated that the Minnesota Public Utilities Commission ("Commission") cannot make an informed decision without a complete record that is evaluated by all parties to the proceeding.

At this stage in the contested case, Minnesota Power has not signed the Protective Order because the terms of the Protective Order (Paragraph 1(c)(ii)(D)) effectively prohibit Minnesota Power from fully participating in the contested case due to restrictions on access to trade secret information by internal utility personnel. Minnesota Power must rely on these personnel to provide relevant testimony, and would not be able to both use the trade secret information and have them sponsor testimony. This is the unfortunate situation the Protective Order presents.

Minnesota Power's exception to the Protective Order is consistent with statements we made at the May 15, 2006 Pre-Hearing Conference. See Transcript at pages 72-73. Minnesota Power realizes that by not signing the Protective Order we are not able to fully

participate in this contested case. For example, Minnesota Power cannot rebut trade secretized direct testimony, especially as it relates to pricing and financial risk information in Excelsior Energy's proposed power purchase agreement ("PPA"). In addition, unless the Protective Order is significantly modified in accordance with Xcel Energy's Motion, Minnesota Power's participation in the upcoming evidentiary hearing will also be severely limited, even to the point of what questions we can ask, let alone what answers we can hear.

Minnesota Power strongly believes that unless the Protective Order is eliminated or modified consistent with Xcel Energy's Motion, there is a strong possibility that the Commission will find the record incomplete and send any recommendation back for further evidentiary development. As Chair Koppendrayner stated at the July 27, 2006 hearing:

I think that Commissioner Nickolai spelled out quite clearly the interpretation of the statute; and if it isn't satisfied, if we're not satisfied with what you come back with, we're going to start over. And I don't think anybody wants to do that. So the more complete the record is, the better we are.

July 27, 2006 Commission Hearing transcript at page 63, lines 11-16.

Furthermore, given the explicit public interest standards set forth in Minn. Stat. §§ 216B.1693(b) and 216B.1694, subd. 7, it is imperative that the record in this case be as open and transparent as possible, consistent with Minn. Stat. § 13.37 and the Commission's September 1, 1999 Revised Procedures for Handling Trade Secret and Privileged Data. In particular, Excelsior Energy's burden to demonstrate that the Mesaba Project "is or is likely to be a least cost resource" (Minn. Stat. § 216B.1693(a)) necessitates that any information that leads to that determination be publicly available. However, as is shown throughout the direct testimony of Excelsior Energy, Xcel Energy, and even the Department of Commerce, PPA pricing and financial risk information is not publicly available. Therefore, whether or not the Mesaba Project meets the statutory



criteria in Minn. Stat. § 216B.1693(a) cannot be publicly justified and rebutted, if necessary.

One concern specific to Minnesota Power resulting from the Protective Order is in the Direct Testimony of Xcel Energy witness Dean E. Schiro dated September 5, 2006. Mr. Schiro provides analysis of the costs of transmission network upgrades that will be needed for delivery of the energy from the Mesaba Project to Xcel Energy's system. On page 12 of his testimony, Mr. Schiro states that of the \$180 million in network upgrades, "\$77 million of this cost could be borne by Minnesota Power and its retail and wholesale customers." Schiro Direct at page 12, lines 12-15. Mr. Schiro goes on to provide additional analysis regarding this calculation including how much of the \$180 million Xcel Energy and its customers would be responsible for compared to what could be assigned to Minnesota Power. Schiro Direct at page 12, lines 17-23. However, that analysis is deemed trade secret and therefore, Minnesota Power is not able to fully respond to Mr. Schiro's analysis and whether the \$77 million is correct and whether Minnesota Power's potential allocation is correct. As Commission Nickolai clearly articulated during the July 27, 2006 Commission hearing:

The second level of this though is that we need to know all of the costs that are – that could be borne by Xcel customers because we're looking at – and not nec – and those that are not being flown through the PPA. But, for example, if – under the transmission construction, if Xcel customers are going to end up – or **Minnesota Power customers** are going to be – end up bearing up a very substantial part of the costs of these transmission upgrades, we need to know that.

July 27, 2006 Commission Hearing transcript at page 54, lines 14-23 (emphasis added). Because Xcel Energy is bound by the terms of the Protective Order in preparing its testimony, Minnesota Power cannot adequately develop a record on the extent Minnesota Power customers may end up bearing the costs of Mesaba Project transmission upgrades.

As a regulated public utility in the State of Minnesota, Minnesota Power is also concerned about trade secretized testimony regarding financial integrity issues that Xcel Energy may face if the Commission requires Xcel Energy to enter into a PPA for the

Mesaba Project. For example, the Direct Testimony of Xcel Energy witness Marvin E. McDaniel dated September 5, 2006 provides in-depth information about the accounting consequences a Mesaba Project PPA would create for Xcel Energy, but the exact terms and conditions in the Mesaba Project PPA that are the root of these consequences are trade secret. McDaniel Direct at pages 7-9. Based on the accounting changes described by Mr. McDaniel, other Direct Testimony by Xcel Energy witness George Tyson II dated September 5, 2006 forecasts the potential for significant financial consequences to Xcel Energy, and in turn its parent company, XEI, as a result of the accounting changes Xcel Energy and XEI would have to make to absorb the cost and risks of the proposed Mesaba PPA. These consequences to Xcel Energy and/or XEI include things such as credit rating downgrades, negative stock and bond price impacts, increased costs for borrowing money to finance investments in infrastructure and increases in utility revenue requirements. In this proceeding, where public confidence and investment in a public utility's financial well-being may be negatively affected by the eventual decision on the Mesaba PPA, the public has a right to know what these risks are and why Xcel Energy ratepayers and/or shareholders would be required to absorb them.

These financial considerations are also directly applicable to Minnesota Power for two reasons. First, under Minn. Stat. § 216B.1694, subd. 2(5), Minnesota Power is subject to the "must consider" provisions, so it potentially could be faced with these same financial integrity concerns in a Commission proceeding where it is being asked to consider acceptance of a similar PPA. Second, decisions made by the Commission in its proceedings send messages to the investment community about the regulatory environment in the State in general. Thus, what happens with the Mesaba PPA could affect all public utilities, including Minnesota Power. If the Commission requires Xcel Energy to execute a PPA under the current veil of secrecy, Minnesota Power's regulatory prospects on certain issues could potentially be brought into question by outside investors and credit rating agencies based on a Commission decision derived in this proceeding from nonpublic information.

In conclusion, Minnesota Power respectfully requests that Xcel Energy's Motion be granted and that Excelsior Energy publicly provide information that should not be deemed confidential. In this statutorily-driven project proceeding, the Commission needs PPA pricing and financial risk factors that are in fact public in order to make a public interest determination.

Dated: September 15, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David R. Moeller", is written over a horizontal line.

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