

BRIGGS AND MORGAN

PROFESSIONAL ASSOCIATION

WRITER'S DIRECT DIAL

(612) 977-8566

WRITER'S E-MAIL

mkrikava@briggs.com

September 5, 2006

VIA E-MAIL & MESSENGER

The Honorable Steve M. Mihalchick
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401

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 Memorandum of Law in Support of Motion for Protection of Unaffiliated Third-Party Trade Secrets and Affidavit of A.J. Conley 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

MCK/rlh
Enclosures
cc: The Service List

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

**MEMORANDUM OF LAW IN SUPPORT
MOTION FOR PROTECTION OF
UNAFFILIATED THIRD-PARTY TRADE
SECRETS**

PROCEDURAL BACKGROUND

On August 25, 2006, Petitioners Excelsior Energy, Inc. and MEP-I LLC (collectively "Mesaba 1 LLC") served discovery on Northern States Power Company d/b/a Xcel Energy ("Xcel Energy" or the "Company") seeking the Company's forecast of natural gas prices for the period 2012-2015. Some of the requested data involved pricing forecasts that Xcel Energy purchases from PIRA Energy Group ("PIRA"), an unaffiliated, third-party service provider. In conformance with the Protective Order concerning unaffiliated, third-party data, Xcel Energy contacted PIRA to determine if it had any objection to the Company disclosing data subject to the protections against unauthorized use and disclosure contained in the Protective Order adopted in this Docket on June 5, 2006. Affidavit of A.J. Conley ("Conley Affidavit") at ¶ 2 (accompanying this Memorandum of Law).

PIRA responded that it had no objection to disclosure of forecast data to Mesaba 1 LLC because it has a contract with PIRA for the data that Xcel Energy would disclose. *Id.* at 3. PIRA also stated that it had no objection to the Administrative Law Judges ("ALJs") and state agency personnel having access to the data because 1) they are not commercially involved in the energy market, and 2) they

are required by statute to maintain the secrecy of the data subject to both criminal and civil penalties for the failure to do so. *Id.* However, PIRA did object to anyone that is commercially involved in the energy market having access to PIRA's data absent a contract to purchase the data. *Id.* at ¶ 4.

A number of individuals in this litigation who are active in the energy market have signed Exhibit A to the Protective Order (including consultants to Mesaba 1 LLC who only recently signed Exhibit A's) and thus could be entitled to PIRA's forecast data without having executed a contract to purchase the data. Xcel Energy therefore filed on August 28, 2006, its Notice of Motion for Protection of Unaffiliated, Third-Party Trade Secrets, pursuant to Section 1(c)(iii) of the Protective Order. Xcel Energy now submits this Memorandum of Law and the Conley Affidavit in Support of its Motion for Protection.

ARGUMENT

The First Prehearing Order issued by the ALJs in this proceeding specifies that trade secret and other nonpublic data "shall be prepared and marked in accordance with the Commission's September 1, 1999 Revised Procedures for Handling Trade Secret and Privileged Data" ("*Commission Trade Secret Procedures*"). First Prehearing Order at ¶ 15. Those procedures provide that only data that meets the definition of a trade secret under Minn. Stat. § 13.37 will be protected from disclosure. *Commission Trade Secret Procedures* at ¶¶ 1-2. Trade secret data is defined 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 reasonable 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. § 13.37, subd. 1(b).

The Conley Affidavit accompanying this Memorandum of Law demonstrates that PIRA's natural gas forecasting data meets the definition of a trade secret. Mr. Conley, PIRA's Chief Operating Officer, states:

PIRA provides the most respected natural gas forecasting service in the industry. Our business depends on industry members being willing to pay to obtain the most accurate forecasting information available. PIRA therefore takes all reasonable measures to maintain the secrecy as well as the accuracy of its data so that it maintains its commercial value for us and for our customers. A customer must register who within its organization will have access to the PIRA data it purchases, and may not share the data with others.

Conley Affidavit at ¶ 5. Furthermore, Mr. Conley states that individuals who obtain the data can use it in their business with the confidence that comes from the knowledge that the forecast is by PIRA. *Id.* at ¶ 6. Thus, PIRA data has independent economic value from not being generally known to or ascertainable by others by proper means, and individuals can obtain economic value from its disclosure and use.

While there is a Protective Order in place that prohibits the use of any trade secret data for any purpose other than this litigation, Mr. Conley states it does not provide adequate protection against potential misuse of PIRA forecast data without proper compensation to PIRA. Conley Affidavit at ¶ 6. PIRA therefore objects to the disclosure of any PIRA data to anyone other than Mesaba 1 LLC and its registered PIRA data users and the government personnel involved in this litigation. *Id.* at ¶ 7.

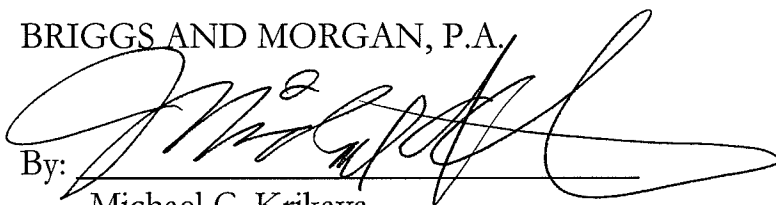
CONCLUSION

On behalf of PIRA, an unaffiliated, third-party service provider to Xcel Energy, the Company asks the ALJs to issue a protective order preventing any PIRA data Xcel Energy discloses to Mesaba 1 LLC in the course of these proceedings from being shared with any Mesaba 1 LLC employee, consultant, witness, or other representative who is not a registered user of the data under Mesaba 1 LLC's contract with PIRA, and from being shared with any other party in this litigation that is not a government agency.

Dated: September 5, 2006

Respectfully submitted,

BRIGGS AND MORGAN, P.A.

By: 

Christopher B. Clark
Assistant General Counsel
Xcel Energy Services Inc. on
behalf of Northern States Power
Company
414 Nicollet Mall – Fifth Floor
Minneapolis, MN 55401
(612) 215-4593

Michael C. Krikava
Thomas Erik Bailey
Bray Dohrwardt
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys on Behalf of
Northern States Power Company,
a Minnesota Corporation d/b/a Xcel Energy

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

**AFFIDAVIT OF A.J. CONLEY
IN SUPPORT OF MOTION FOR
PROTECTION OF UNAFFILIATED THIRD-
PARTY TRADE SECRETS**

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

A. J. CONLEY, being first duly sworn on oath, states as follows:


1. I am Chief Operating Officer of PIRA Energy Group. My office is located at 3 Park Avenue, New York, New York. In my position at PIRA, I am responsible for overseeing requests that PIRA consent to allow its proprietary, confidential trade secret natural gas forecasting data be used by persons or entities that have not entered into a contract with PIRA to obtain this information. This issue usually comes up in the context of litigation.
2. PIRA was contacted by Thomas Erik Bailey, counsel for Northern States Power Company d/b/a Xcel Energy ("Xcel Energy") regarding a request from Excelsior Energy, Inc. ("Excelsior") for Xcel Energy's forecasts of the price of natural gas over the next ten years, which is based on data that Xcel Energy has purchased from PIRA. Mr. Bailey explained that the request was part of

discovery being conducted in the above-captioned case, and that if Xcel Energy provided the data to Excelsior it would be subject to a protective order. Mr. Bailey provided PIRA with a copy of the protective order and asked whether PIRA had any objection to Xcel Energy disclosing the data to Excelsior.

3. PIRA has no objection to the disclosure of the data to Excelsior because Excelsior has entered into a contract with us and already has access to the data Xcel Energy would provide. PIRA also has no objection to the Administrative Law Judges and state agency personnel having access to the data because they are not commercially involved in the energy market, and are required by statute to maintain the secrecy of the data subject to both criminal and civil penalties for the failure to do so.
4. However, my understanding from reviewing the protective order is that a number of Excelsior consultants and other parties in this litigation that are commercially active in the energy market would also have access to the data. PIRA cannot agree that anyone that is commercially involved in the energy market can have access to PIRA's data absent a contract to purchase the data from us.
5. PIRA provides the most respected natural gas forecasting service in the industry. Our business depends on industry members being willing to pay to obtain the most accurate forecasting information available. PIRA therefore takes all reasonable measures to maintain the secrecy as well as the accuracy of its data so that it maintains its commercial value for us and for our customers. A customer must register who within its organization will have access to the PIRA data it purchases, and may not share the data with others.

6. Our concern is that individuals in this litigation who obtain this data without a contract with PIRA could readily review and remember our forecasts of future gas prices without ever making a record of the data, and could then use it with the confidence that comes from the knowledge that the forecast is by PIRA. The protective order's provisions that the data may not be used for business or commercial purposes, and must be returned or destroyed at the conclusion of this litigation, simply does not protect the data from actually being used and disseminated within the industry to the detriment of our business.
7. PIRA objects to Xcel Energy disclosing any PIRA natural gas forecasting data to anyone in this litigation that has not paid for it. While our objection does not apply to Excelsior itself or government personnel involved in this litigation, it does apply to any Excelsior employee, consultant, witness, or other representative who is not a registered user of the data under our contract with Excelsior, and to all other parties in this litigation.

FURTHER AFFIANT SAYETH NOT.



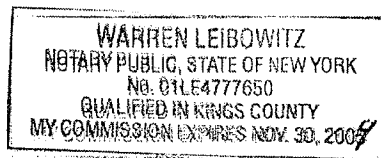
A.J. Conley

Subscribed and sworn to before me
this 5th day of September, 2006.



Notary Public

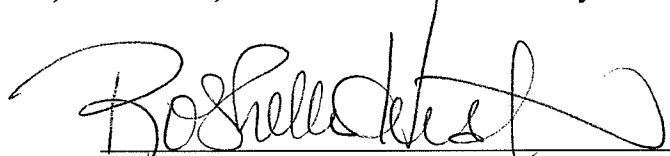
1941203v1



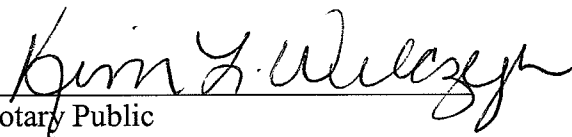
STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

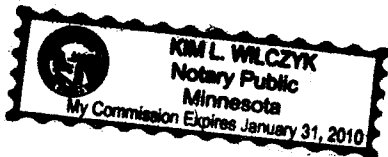
AFFIDAVIT OF SERVICE
MPUC Docket No. E-6472/M-05-1993
OAH Docket No. 2500-17210

Roshelle Herstein of the City of Crystal, County of Hennepin, State of Minnesota, says that on the 5th day of September, 2006, she served Xcel Energy's Memorandum of Law in Support of Motion for Protection of Unaffiliated Third-Party Trade Secrets and Affidavit of A.J. Conley upon the people listed upon the attached service list via e-mail and U.S. Mail except for The Honorable Steve Mihalchick, The Honorable Bruce Johnson, Burl Haar, Sharon Ferguson, Julia Anderson, Byron Starns, Scott Harris and Brian Meloy. Judge Mihalchick, Judge Johnson, Dr. Haar, Ms. Ferguson, Ms. Anderson, Mr. Starns, Mr. Harris and Mr. Meloy are all being served via e-mail and messenger.


Roshelle L. Herstein

Subscribed and sworn to before me this
5th day of September, 2006.


Notary Public



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**

Commission and Administrative Law Judges

Burl W. Haar (15)
Minnesota Public Utilities Commission
Suite 350
121 East Seventh Place
St. Paul, MN 55101-2147

Steve M. Mihalchick (Original)
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401

Bruce H. Johnson (1)
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401-2138

Parties

Sharon Ferguson (4)
Minnesota Department of Commerce
Suite 500
85 7th Place East
St. Paul, MN 55101-2198

Julia Anderson
Minnesota Office of the Attorney General
1400 BRM Tower
445 Minnesota Street
St. Paul, MN 55101-2131

Valerie M. Smith
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131

Thomas L. Osteraas
Excelsior Energy
Suite 305
11100 Wayzata Boulevard
Minnetonka, MN 55305

Byron E. Starns
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

Scott G. Harris
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

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**

Brian M. Meloy
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402

Christopher B. Clark
Xcel Energy
800 Nicollet Mall
Suite 2900
Minneapolis, MN 55402

Michael C. Krikava
Briggs and Morgan, P.A.
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

SaGonna Thompson
Xcel Energy
414 Nicollet Mall
RSQ-4
Minneapolis, MN 55401-1993

Judy Pofert
Xcel Energy Services, Inc.
5th Floor
414 Nicollet Mall
Minneapolis, MN 55401

Chuck Kerr
Great Northern Power Development, L.P.
Suite 3600
601 Jefferson Street
Houston, TX 77002-7906

David R. Moeller
Minnesota Power
30 West Superior Street
Duluth, MN 55802-2093

Richard A. Voss
Vice President – Power Development
Great Northern Power Development LP
Suite E
1022 East Divide Avenue
Bismarck, ND 58501

Antone J. Rude
Great Northern Power Development LP
10127 93rd Street NE
Monticello, MN 55362

Alan C. Lukes
Great Northern Power Development LP
1749 Pinto Place
Bismarck, ND 58503

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**

Carol Overland
Overland Law Office
402 Washington Street
Northfield, MN 55057-2467

John E. Drawz
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402-1425

Mollie M. Smith, Esq.
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402-1425

Steven J. Quam
Fredrikson & Byron, P.A.
Suite 4000
200 South Sixth Street
Minneapolis, MN 55402-1425

William A. Blazar
Senior Vice President, Government Affairs
and Business Development
Minnesota Chamber of Commerce
400 Robert Street North
Suite 1500
St. Paul, MN 55101

Mike Franklin
Manager, Energy, Labor/Mgmt., and
Elections Policy
Minnesota Chamber of Commerce
400 Robert Street North
Suite 1500
St. Paul, MN 55101

Elizabeth Goodpaster
Minnesota Center for Environmental
Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101

Eric F. Swanson
Winthrop & Weinstine, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402

Robert S. Lee
Mackall, Crouse & Moore, PLC
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402

Todd J. Guerrero
Lindquist & Venum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2274

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**

David Sasseville
Lindquist & Vennum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2274

Mark Rolfes
Otter Tail Power Company
215 South Cascade Street
PO Box 496
Fergus Falls, MN 56538-0496

Bray Dohrwardt
Briggs and Morgan, P.A.
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

Nico Kieves
Excelsior Energy Inc.
11100 Wayzata Boulevard, Suite 305
Minnetonka, MN 55305

Non-party Participants

Annette Henkel
Minnesota Utility Investors
405 Sibley Street #227
St. Paul, MN 55101

David M. Aafedt
Winthrop & Weinstine, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402

Jerry Larsen
HPC-LLC
4610 IDS center
80 South 8th Street
Minneapolis, MN 55402

Peter H. Grills
W2800 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101

Robert H. Schulte
Schulte Associates, LLC
9072 Palmetto Drive
Eden Prairie, MN 55347

Steven Clemmer
Clean Energy Research Director
Union of Concerned Scientists
2 Brattle Sq., 6th Floor
Cambridge, MA 02238
(E-mail only)

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**

Kathleen L. Winters
Assistant Attorney General
Suite 900 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127
(MPCA)

Email Service List

Parties

Janet.gonzalez@state.mn.us
steve.mihalchick@state.mn.us
bruce.johnson@state.mn.us
maria.lindstrom@state.mn.us
julia.anderson@state.mn.us
christopher.b.clark@xcelenergy.com
tomosteraas@excelsiorenergy.com
sharon.ferguson@state.mn.us
squam@fedlaw.com
msmith@fredlaw.com
jdrawz@fredlaw.com
dmoeller@allete.com
overland@redwing.net
christophergreenman@excelsiorenergy.com
byron.starns@leonard.com
brian.meloy@leonard.com
scott.harris@leonard.com
teresa.j.kowles@xcelenergy.com
Jennifer.sanner@xcelenergy.com
mkrikava@briggs.com
valerie.smith@state.mn.us
bblazar@mnchamber.com
dsasseville@lindquist.com
tguerrero@lindquist.com
rsl@mcmlaw.com
eswanson@winthrop.com
bgoodpaster@mncenter.org
mrolfes@otpc.com
apm@mcmlaw.com
bdohrwardt@briggs.com

Non-party Participants

daafedt@winthrop.com
ahenkel@mutilityinvestors.org
Jerome.larsen@hpc-llc.com
rhs@schulteassociates.com
pete.grills@grillslegal.com
slemmer@ucsusa.org
jshaddix@janetshaddix.com
Kathleen.winters@state.mn.us
nicok@excelsiorenergy.com