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September 12, 2006

VIA E-MAIL & U.S. MAIL

The Honorable Steve M. Mihalchick
Office of Administrative Hearings
Suite 1700
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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

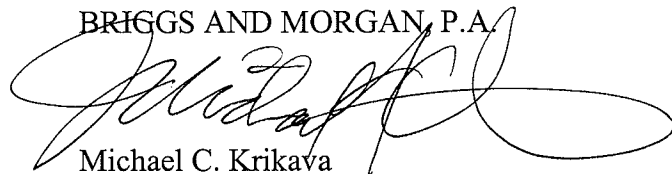
Dear Judge Mihalchick:

Enclosed for filing, please find the original of Xcel Energy's Motion and Memorandum for Clarification of Scope of Contested Case Issues 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/rh
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

**XCEL ENERGY'S MOTION AND
MEMORANDUM FOR CLARIFICATION
OF SCOPE OF CONTESTED CASE ISSUES**

I. INTRODUCTION

Northern States Power Company d/b/a Xcel Energy ("Xcel Energy" or "the Company") hereby moves the Administrative Law Judges ("ALJs") for clarification of the scope of issues presently before the ALJs in this contested case proceeding and adjustment of the schedule as appropriate based upon that determination. Xcel Energy seeks this clarification based upon the new issue raised by the September 5, 2006 new direct testimony of Renee J. Sass filed by Petitioners Excelsior Energy Inc. and MEP-1 LLC (collectively "Mesaba 1 LLC").

In her new testimony, Ms. Sass discusses for the first time the pricing of a 450 MW proposal in comparison to the 603 MW power purchase agreement ("Mesaba 1 PPA") contained in the Petition that the Minnesota Public Utilities Commission ("Commission") referred to the ALJs for hearing. Ms. Sass's new testimony leaves unclear whether Mesaba 1 LLC is proposing that a 450 MW alternative to the Mesaba 1 PPA. If so, advancing a 450 MW alternative at this point in the proceedings is unfair to the other parties. If Mesaba 1 LLC desires a 450 MW alternative to be considered in this contested case, both the scope and schedule of these proceedings need to be adjusted to take into account this new issue.

Xcel Energy requests that the ALJs determine whether the new 450 MW alternative Mesaba 1 LLC appears to be proposing comes within the scope of the Commission's referral. If so, Xcel Energy respectfully requests that the ALJs modify the procedural schedule to provide adequate time to develop the record on this new issue without prejudicing the rights or interests of any of the parties. If not, Xcel Energy requests that the ALJs determine whether the parties should nevertheless address the new 450 MW alternative in this proceeding, or whether it should be dismissed to allow Mesaba 1 LLC to re-file with the Commission as part of a new proposal in the future.

II. DISCUSSION

A. Consideration of a 450 MW Alternative is Not Appropriate at this Time.

In its December 2005 Petition, Mesaba 1 LLC included the Mesaba 1 PPA and requested the Commission to determine that Xcel Energy must “purchase all of the electricity and capacity to be provided from the operation of the Mesaba Energy Project Unit One” Mesaba 1 LLC Petition at 1. Mesaba Unit 1 was and continues to be proposed as a 603 nominal power plant and the request in the Petition was to purchase all of the plant's output pursuant to the terms of the attached Mesaba 1 PPA. The Petition, the Mesaba 1 PPA, and related filings did not propose or seek approval of a 450 MW alternative, nor did those filings suggest that the Mesaba 1 PPA was a generic document structured to address variations in the amount of power to be sold.

On April 25, 2006, the Commission referred the petition to a contested case proceeding. The Commission stated that the issues to be addressed are: 1) whether the Commission should approve, disapprove, amend, or modify the terms and conditions of the proposed power purchase agreement pursuant to Minn. Stat. §§ 216B.1694; 2) whether the Commission should approve, disapprove, amend, or modify the proposed PPA pursuant to Minn. Stat. § 216B.1693; and 3) whether at

least 13% of Xcel Energy's retail energy needs should be provided by Mesaba 1 LLC by 2013 pursuant to Minn. Stat. § 216B.1693.¹ As the only PPA filed and submitted for approval was the 603 MW Mesaba 1 PPA included in Mesaba 1 LLC's Petition, that is the only PPA that the Commission referred to this contested case proceeding.

1. *Mesaba 1 LLC's Subsequent Filings Indicate It is Not Offering a 450 MW PPA For Consideration In This Case.*

Pursuant to the ALJs scheduling order, Mesaba 1 LLC submitted its statement of the case and supplemental direct testimony in support of its petition in June 2006. Those filings reaffirmed the proposal of a 603 MW Mesaba 1 PPA, not a 450 MW PPA. Through the proposed testimony of Thomas Oстераas, Mesaba 1 LLC stated that "Excelsior Energy requests the Minnesota Public Utilities Commission ("MPUC") to approve the PPA for the first unit of the Mesaba Energy Project, Mesaba Unit 1, which has a capacity of approximately 603 MW." Supplemental Testimony of Thomas L. Oстераas at 6. *See also* Excelsior Energy Inc.'s Statement of the Case at 5-6 (explaining the Mesaba 1 PPA covers a total of 603 MW).

Subsequently, Mesaba 1 LLC informed Xcel Energy during the course of discovery that it had not prepared any terms or conditions for a 450 MW PPA. In response to an information request about whether Mesaba 1 LLC could proceed with its project if the Commission only approved a 450 MW PPA, Mesaba 1 LLC objected that the question "calls for speculation." It further responded:

Due to the intrinsically unpredictable nature of wholesale electricity markets, financial markets, and fuel markets, Excelsior cannot predict the terms of sale if the Commission approves a PPA that is for less than 603 MW of plant capacity. Excelsior does note that absent certainty respecting its ability to find other purchasers for the excess

¹ The ALJs bifurcated consideration of these issues, with phase one of the contested case proceeding addressing Issues 1 and 2, and phase two addressing Issue 3 because it involves a second 600 MW unit proposed by Mesaba 1 LLC. All matters concerning a proposed second unit have been deferred to a later stage of this proceeding.

capacity, the anticipated revenues from the PPA will serve as the means to obtain sufficient funding for the financing of the Project. Accordingly, while it is impossible at this time to conduct a detailed analysis as to how the proposed rates in the PPA would change, it is safe to assume that the cost per mwh of the PPA would be higher if it is limited to 450 MW, as compared to the cost per megawatt hour for a 603 MW PPA. Excelsior has not prepared terms and conditions for a 450 MW power sale.

Response to Xcel Energy IR No. 21 (emphasis added)(Attachment A).

2. *The Commission's Request for Further Record Development In This Contested Case Proceeding Did Not Involve A 450 MW Alternative.*

On July 27, 2006, the Commission held a hearing to ensure that certain issues would be adequately addressed in this contested case proceeding. Specifically, the Commission requested that the parties develop the record with respect to 1) the proposed West Range v. the alternative East Range site for Mesaba Unit 1; 2) the cost and timing of additional network transmission needed to deliver energy from Mesaba Unit 1 to Xcel Energy's load; and 3) the application of CO₂ sequestration at Mesaba Unit 1. *Commission Hearing Transcript* (July 27, 2006) at 10-12, 20-26 (CO₂ sequestration); 50-52 (East Range site); 45-49, 54-55 (transmission).

The Commission did not request further supplementation pertaining to the size of the proposed Mesaba 1 PPA. At a scheduling hearing before the ALJs following the Commission's July 27 hearing on the issues in this proceeding, Mesaba 1 LLC indicated that it would file supplemental testimony with respect to the East Range site, but little or nothing else on the other issues identified by the Commission.² It did not indicate it intended to effectively amend its December petition through supplemental

² At the July 28, 2006 ALJ hearing, Mesaba 1 LLC informed the ALJs that it would be submitting supplemental testimony on the East Range site. *Hearing Transcript* at 32-33. Mesaba 1 LLC stated it did not believe it would be providing any supplemental testimony regarding transmission or CO₂ sequestration. *Id.* at 31-32, 33-34, 44. The ALJs determined that Mesaba 1 LLC's supplemental direct testimony on these issues was due September 5, 2006.

testimony about a 450 MW alternative as an alternative to the 603 MW PPA that it heretofore always identified as its only proposal.

3. *Mesaba 1 LLC's New Testimony Is An Untimely Attempt to Respond to Xcel Energy's Statement of the Case.*

On August 14, 2006, Xcel Energy submitted its statement of the case. Xcel Energy stated its position that since Mesaba 1 LLC was not proposing a 450 MW PPA, the public interest criteria applicable to a 450 MW alternative under Minn. Stat. § 216B.1694 are not determinative regarding whether the Commission should approve, disapprove, or modify the Mesaba 1 PPA. Rather, the statutory criteria of Minn. Stat. § 216B.1693 are controlling. On September 5, 2006, Xcel Energy and other parties submitted direct testimony consistent with that view of the statutes. As stated in that testimony, since no 450 MW alternative had been proposed, detailed analysis of Minn. Stat. § 216B.1694 was unnecessary.³

After Xcel Energy's August 14, 2006 statement of the case pointed out that one of the two statutes that Mesaba 1 LLC relies on in support of its 603 MW PPA cannot apply, Mesaba 1 LLC for the first time raised the 450 MW alternative for consideration in this proceeding through the supplemental testimony. The purpose for supplemental direct testimony, however, was not to respond to parties' statements of the case. Indeed in the original schedule, the statement of the case was due at the same time as the direct testimony. Only due to discovery disputes was additional time provided to all the other parties to prepare and submit their direct testimony, resulting in the separation of their statements of the case from their direct testimony.

B. Mesaba 1 LLC's Purpose for the 450 MW Alternative is Not Clear.

Because Mesaba 1 LLC previously did not include a 450 MW alternative and did not provide any information about a 450 MW PPA in discovery, the reasons to

³ Dr. Eilon Amit, a witness for the Department of Commerce, also addresses in his testimony the implications of Mesaba 1 LLC's failure to include a 450 MW PPA in its direct case. *See, e.g.*, Direct Testimony of Eilon Amit at 7.

introduce it for consideration now are unclear. Additionally, it prejudices parties who, from December to September, relied on Mesaba 1 LLC's description of its filing.

Ms. Sass's testimony does not adequately explain the intent behind her discussion of a 450 MW alternative. Specifically, it is unclear whether Mesaba 1 LLC is now seeking consideration of a 450 MW PPA given that it has proposed no new or different terms and conditions for a purchase that is considerably less than its proposed 603 MW PPA. While the new material covered by Ms. Sass does briefly discuss that excess capacity could be sold in the MISO market and the proceeds shared with Xcel Energy, there is no discussion regarding how that sharing would work, and how it would impact the capacity costs of a 450 MW PPA.

The new material also does not discuss the financing difficulties that would be encountered if Mesaba 1 LLC was required to market its excess capacity in the MISO market without a long term PPA. Also unclear from the new material is how the timing of the construction of Mesaba Unit 1 would be affected if it is producing energy in excess of an amount that is guaranteed for sale to Xcel Energy. Finally, there is no analysis about whether a smaller PPA (if one is actually being proposed) would meet the public interest criteria applicable under Minn. Stat. §§ 216B.1693 and 216B.1694. Given that Ms. Sass's testimony does not address any of these issues with any specificity, the parties are now in the position of having to conduct discovery to determine exactly what Mesaba 1 LLC is and is not proposing, and to respond to it.

C. Appropriate Procedures Should be Followed With the New Material.

Ms. Sass's new testimony expands the scope of this proceeding beyond the Commission's referral, and beyond what the ALJs and the parties (including Mesaba 1 LLC) contemplated.⁴ Such an expansion, if allowed, requires additional time for the parties to develop discovery and direct testimony regarding the 216B.1694 criteria.

⁴ The applicable Rules provide that the issues to be addressed in a contested case proceeding are those contained in the agency's referral of the matter to the Office of Administrative Hearings. Minn. R. 1400.5600, subp. 2. Once the agency has defined the issues to be addressed, parties are permitted to

Changing the theory of the case now without authorization from the referring agency creates due process concerns as other parties lack adequate notice of the issues being litigated. Mesaba 1 LLC's new material on a 450 MW alternative casts doubt on whether the parties can respond adequately given the tight schedule in this case and the inability to put in a direct case on this new material. Parties should not be required to address this new material only on rebuttal. *See* Beck, George, MINNESOTA ADMINISTRATIVE PROCEDURE 2nd Ed., p. 61-63 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *State v. Duluth M. & I R. Ry.*, 246 Minn. 383, 400, 75 N.W.2d 398, 410 (1956)).

Xcel Energy does not object to expanding the scope of the proceeding so a 450 MW alternative can be considered. However, Xcel Energy does object to this new issue arising at this time and being proposed as part of Mesaba 1 LLC's supplemental filings, particularly after it has led parties to believe it disclaimed such an alternative up to this point in the proceedings. If the ALJs determine that this new material can properly be considered under the Commission's referral, then a reasonable amount of time must be allowed for all parties to prepare to address this new proposal as provided under Minn. R. 1400.5600, subp. 5. If Mesaba 1 LLC opposes providing time for parties to analyze the new 450 MW alternative, then Xcel Energy believes the new proposal should be disallowed.

Xcel Energy suggests that Mesaba 1 LLC should be required to file supplemental testimony to clarify whether it is now seeking consideration of a 450 MW alternative in this contested case and whether the material terms of such a PPA differ from those in the proposed Mesaba 1 PPA and how such a new PPA would

introduce testimony relevant to those issues. Minn. R. 7100, subp. 1. Parties must stay within the issues referred by the agency and may not broaden those issues without authority. Finally, while the agency may amend the issues to be considered, it must then allow sufficient additional time to respond to the amendment upon a party's request. Minn. R. 1400.5600, subp. 5. The present motion includes Xcel Energy's request pursuant to this rule for the opportunity to respond to the new material if it is found to be authorized.

meet the public interest criteria applicable under Minn. Stat. §§ 216B.1693 and 216B.1694. Upon such clarification, the other parties will be in a position to develop analysis, conduct discovery on the new proposal, and provide appropriate responses.

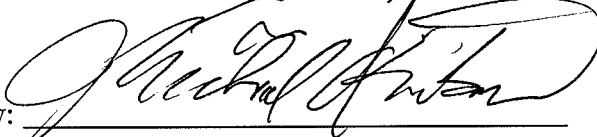
III. CONCLUSION

For all these reasons, the ALJs should make a determination whether the 450 MW alternative discussed in the new testimony of Renee Sass is beyond the scope of the issues referred to this contested case. If so, the parties should be provided a reasonable time to prepare a response, as provided by Rule.

Dated: September 12, 2006

Respectfully submitted,

BRIGGS AND MORGAN, P.A.

By: 

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Xcel Energy
Information Request No. 21 to Excelsior Energy

21. In the event that the Commission grants approval of only the 450 MW power sale referenced in Minn. Stat. § 216B.1694 and denies any additional power sales in this docket, would Excelsior Energy still be able to construct Mesaba Unit One with a power sale of 450 MW on the terms and conditions proposed by Excelsior Energy? If no, has Excelsior prepared T & C for a 450 MW power sale? If yes, please provide all supporting material.

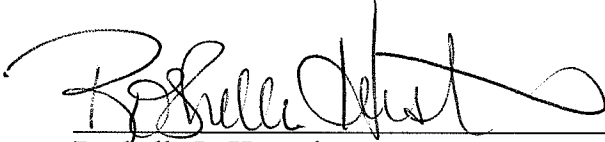
Excelsior Energy
Response to Xcel Energy IR No. 21

This is a hypothetical question that calls for speculation. Excelsior would, most likely, seek to market the excess power in the event the PPA were limited to 450 MW. Due to the intrinsically unpredictable nature of wholesale electricity markets, financial markets, and fuel markets, Excelsior cannot predict the terms of sale if the Commission approves a PPA that is for less than 603 MW of plant capacity. Excelsior does note that absent certainty respecting its ability to find other purchasers for the excess capacity, the anticipated revenues from the PPA will serve as the means to obtain sufficient funding for the financing of the Project. Accordingly, while it is impossible at this time to conduct a detailed analysis as to how the proposed rates in the PPA would change, it is safe to assume that the cost per megawatt hour of the PPA would be higher if it is limited to 450 MW, as compared to the cost per megawatt hour for a 603 MW PPA. Excelsior has not prepared terms and conditions for a 450 MW power sale.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

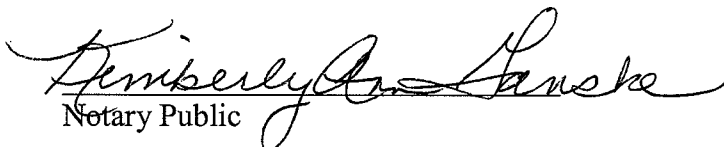
AFFIDAVIT OF SERVICE
MPUC Docket No. E-6472/M-05-1993
OAH Docket No. 2500-17210

Roshelle Herstein of the City of Crystal, County of Hennepin, State of Minnesota, says that on the 12th day of September, 2006, she served Xcel Energy's Motion and Memorandum for Clarification of Scope of Contested Case Issues upon the people listed upon the attached service list via e-mail and U.S. Mail.



Roshelle L. Herstein

Subscribed and sworn to before me this
12th 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

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OAH DOCKET No. 12-2500-17260-2**

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