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

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.

MEMORANDUM IN OPPOSITION TO mncoalgasplant.com's MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The crux of mncoalgasplant.com's ("MCGP") motion for summary judgment is the unfounded allegation that the Mesaba Project's preferred West Range Site was "false[ly] and fraudulent[ly]" designated by Iron Range Resources (formerly known as the Iron Range Resources and Rehabilitation Board) ("IRR") as a site that has substantial real property with adequate infrastructure to support new or expanded development, thereby disqualifying it from the regulatory incentives provided to an innovative energy project under Minn. Stat. § 216B.1694 (the "IEP statute").[1] This argument is little more than a thinly disguised "Not In My Backyard" protest to the development of the Mesaba Project on the preferred West Range Site.

MCGP's motion should be denied as a matter of law for at least three reasons. First, the Legislature delegated the "adequate infrastructure" designation of an Innovative Energy

[1] *See* MCGP Motion for Summary Judgment, at 2.

Project's ("IEP") site to the sole discretion of IRR[2], the state agency with precisely the expertise and experience necessary to make such a determination for a project to be located on Minnesota's Iron Range. As such, a collateral attack on IRR's designation in this docket is futile because the Commission has not been delegated the authority by the Legislature to review and overrule the IRR. If MCGP wishes to appeal IRR's West Range designation on the grounds that it is "false and fraudulent," its only recourse is to seek a writ of certiorari from the Minnesota Court of Appeals.

Second, even if this docket were the appropriate forum for a review of IRR's West Range determination, the agency's designation of the site is an informal factual determination and can only be reversed upon a showing that IRR committed an "abuse of discretion" or acted in a manner that is "arbitrary and capricious."[3] Here, the record clearly demonstrates that IRR engaged in a thorough factual investigation before it designated the West Range Site as a site with "adequate infrastructure to support new or expanded development," including agency staff walk-through's of the proposed site, review of detailed site maps, consultation with state and federal agencies, and participation in the Excelsior Energy/United States Department of Energy site visits for two days in June of 2005.[4] Thus, a court would be unlikely to, and should not, substitute its judgment for that of the agency.

Third, notwithstanding the deference a court must show IRR's reasoned and informed determination, the record clearly demonstrates that the West Range site does, indeed, have "adequate infrastructure to support new or expanded development" as required by the IEP statute. MCGP misconstrues the IEP statute when it argues the statute restricts the consideration

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[2] Minn. Stat. § 216B.1694, subd. 1(3).

[3] *See* Keppel, Administrative Practice and Procedure, Minnesota Practice Series, vol. 21, §§ 14.05.1 and 14.05.2.

[4] *See* Brian Hiti, Deputy Commissioner IRR, Letter to Christopher B. Clark, January 26, 2002 (attached as Exhibit C to MCGP's Motion for Summary Judgment).

of "adequate infrastructure" to the actual plant footprint. This erroneous reading of the statute would restrict IRR to designation of sites that had previously contained large electric generating facilities with all infrastructure elements needed to support the first IGCC power plant in the state — something the Legislature obviously could not have intended because of the absence of such sites within the taconite tax relief area. Rather, the proper interpretation of the term "site" should reflect the Power Plant Siting Rules, which define "site" to encompass the plant footprint as well as land necessary for "associated facilities," including transmission, rail, and other necessary infrastructure.[5] In light of the correct interpretation of the IEP statute, Excelsior has presented more than enough evidence demonstrating the existence of adequate infrastructure on the West Range site.[6] Even if this proceeding were the proper forum for MCGP's claims, MCGP has failed to meet its burden of showing that there is no genuine issue of material fact regarding this issue.

For these reasons, MCGP's motion for summary judgment should be denied.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD IN ADMINISTRATIVE PROCEEDINGS.

The ALJs in administrative proceedings may "recommend a summary disposition of the case or any part thereof where there is no genuine issue as to any material fact." Minn. R. 1400.5500(K). Since the Rules of the Office of Administrative Hearings do not provide detailed guidance, both practitioners and administrative law judges may resort to the Minnesota Rules of Civil Procedure and judicial interpretations thereof as authorities for bringing and deciding motions for summary disposition. *See* Minn. R. 1400.6600.

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[5] *See* Minn. R. 4400.0200, subps. 2a, 6, and 18.

[6] *See* Affidavit of Robert S. Evans II. *See also* Section IV of Excelsior Petition, at 10; Brian Hiti, Deputy Commissioner IRR Letter to Christopher B. Clark, March 22, 2006 (attached as Exhibit D to MCGP's Motion for Summary Judgment).

The civil counterpart to the administrative motion for summary disposition is the motion for summary judgment. *See* Minn. R. Civ. P. 56. The summary judgment standard is established by Rule 56.03, which requires summary judgment in the event "that there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03. As the Minnesota Supreme Court stated in *Sauter v. Sauter*,

> The controlling words Genuine issue and Material fact need no amplification since they best speak for themselves. Their application in determining whether there is an absence of a Genuine issue as to a Material fact requires a careful scrutiny of the pleadings, depositions, admissions, and affidavits, if any, on file.

70 N.W. 351, 353 (Minn. 1955).

The moving party carries the burden of proof and persuasion to establish that no genuine issue of material fact exists. *Johnson v. Winthrop Laboratories Div. of Sterling Drug, Inc.*, 190 N.W.2d 77, 81 (Minn. 1971). Any doubt regarding the existence of a genuine fact issue will be resolved in favor of its existence. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). Here, not only is MCGP raising their argument in an inappropriate forum, but Excelsior has introduced sufficient evidence to demonstrate the existence of adequate infrastructure on the West Range site.

II. MCGP'S CHALLENGE TO IRR'S DISCRETIONARY SITE DESIGNATION IS AN IMPERMISSIBLE COLLATERAL ATTACK AND IS OUTSIDE THE SCOPE OF THESE PROCEEDINGS.

MCGP's misguided motion asserts that the West Range Site has no infrastructure and is therefore ineligible for IEP consideration by the Public Utilities Commission. However, the Legislature clearly delegated the infrastructure determination to the discretionary authority of

IRR, the state agency with greater competence and expertise than any other state agency to make such a determination. Specifically, an IEP must be located on a site

> 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.[7]

The Legislature committed the designation of IEP sites to the discretion of the IRR because of its paramount knowledge of the taconite tax relief area and its experience designating and acquiring underutilized properties for redevelopment.[8] Notably, the Legislature did not delegate site infrastructure discretion to the Commission, as it did with PPA approval authority under the IEP statute. Excelsior recognizes that the Commission must determine that the Mesaba Project fits the overall definition of an IEP under subdivision one of the IEP statute before approving, disapproving, amending, or modifying the proposed PPA under subdivision two. However, with respect to the IRR designation under subdivision one, paragraph three, Excelsior respectfully believes the Commission's inquiry should be limited to whether the IRR actually made the required designation of the site.[9]

In this case, it is undisputed that Commissioner Sandy Layman of IRR did, in fact, designate the preferred West Range location as "a site that has substantial real property with adequate infrastructure to support new or expanded development."[10] Absent explicit authority

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[7] Minn. Stat. § 216B.1694, subd. 1(3) (emphasis added).

[8] Indeed, the IRR's statutory duties include acquiring property on the Iron Range when necessary to develop resources and alleviate depressed economic conditions, including the acquisition of "a right-of-way for access to projects operated on property acquired." Minn. Stat. § 298.22, subd. 3.

[9] *See, e.g.*, DOC Response to MCGP IR No. 15, Sep. 28, 2006 ("Commerce does not presume to have the authority or responsibility to independently verify or, in essence, 'second guess' a Certification determination by the Commission[er] of the IRR.").

[10] *See* Letter of Commissioner Sandy Layman of IRR, November 7, 2005 (attached as Exhibit A to Letter of Brian Hiti, June 19, 2006).

for Commission review of the IRR's infrastructure determination, MCGP's sole remedy is appeal to the Minnesota Court of Appeals by writ of certiorari.[11] MCGP's present challenge to the merits of this designation is an impermissible collateral attack on the IRR's authority and is outside the scope of these proceedings.

III. IRR'S DESIGNATION OF THE WEST RANGE SITE AS POSSESSING ADEQUATE INFRASTRUCTURE WAS NOT ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION.

Even if it were permissible for MCGP to launch a collateral attack on the IRR's West Range site designation in this docket, the standard of review would require great deference to the IRR's judgment. Neither the IEP statute, the IRR Commissioner's statute[12], nor the Minnesota Administrative Procedure Act[13] define the designation of IEP sites by the IRR Commissioner as a "rule" or a "contested case" determination requiring a record. Thus, the designation decision is one of the vast majority of agency actions resolving fact issues informally.[14] As such, the proper standard of review is the "arbitrary and capricious" or "abuse of discretion" tests.[15] Under these standards, the reviewing court must decide

> whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful,

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[11] *See, e.g., Naegle v. Minneapolis Community Dev. Agency*, 551 N.W.2d 235, 237 (Minn. Ct. App. 1996) (holding that absent explicit authority for review of a local agency's quasi-judicial decision in district court, a party's sole remedy is appeal to court of appeals by writ of certiorari); *Heideman v. Metropolitan Airports Comm'n*, 555 N.W.2d 322, 323 (Minn. Ct. App. 1996) (holding that in the absence of an adequate method of review or legal remedy, judicial review of the quasi-judicial decisions of administrative bodies, if available, must be invoked by writ of certiorari).

[12] *See* Minn. Stat. §§ 298.22-.2212.

[13] *See* Minn. Stat. §§ 14.001-.69

[14] *See* Keppel, *supra*, § 10.10, p. 331 ("The vast majority of agency actions which have the effect of resolving disputed facts are informal, that is, are decisions made without contested case hearings, statements of findings or reasons, or even an order.").

[15] *See* Minn. Stat. § 14.69(f). *See also* Keppel, *supra*, §§ 14.05.01 and 14.05.02, citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

> the ultimate standards of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*[16]

Here, the record and the exhibits referenced in MCGP's motion for summary judgment leave no doubt that the IRR's adequate infrastructure designation at the preferred West Range Site was an informed decision, made after a lengthy and thorough investigation. Specifically, the IRR

> assembled a team of staff to investigate and evaluate potential sites. Over roughly a two year period, staff members studied about a dozen sites within the taconite tax relief area that were being considered by Excelsior Energy, Inc. Many of the sites that were reviewed did not meet the requirements set forth by the statute. However, of the original twelve sites, three sites emerged as having strong potential for the project in question. Included in those three sites were the Taconite [West Range] Site and the Hoyt Lakes [East Range] Site.[17]

Rather than an "arbitrary and capricious" designation by IRR based on Excelsior's preference, the West Range site was one of only three sites approved out of the original twelve after two years of investigation and deliberation. The investigation included consideration of all relevant factors:

> In order to determine if the sites had adequate infrastructure to support new or expanded development, the Agency combed through hundreds of documents, walked the sites, reviewed detailed site maps, consulted with various local, state and federal officials and met with project engineers and consultants. The Iron Range Resources Site reviews were broad based, but specifically included an assessment of the environmental aspects of each site including the setting, communities and sensitive areas as well as an evaluation of each sites' existing and potential infrastructure for rail, power transmission, gas, water, wastewater, and highway access.[18]

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[16] *Citizens to Preserve Overton Park*, 401 U.S. at 416 (*emphasis* added).

[17] *See* Brian Hiti, Deputy Commissioner IRR, Letter to Christopher Clark, January 26, 2002 (attached as Exhibit C to MCGP's Motion for Summary Judgment).

[18] *Id.*

This record leaves no doubt that IRR did not abuse the discretion delegated to it by the Legislature under the IEP statute in designating the West Range site as possessing "adequate infrastructure to support new or expanded development." Instead, the IRR carefully considered the alternative sites presented by Excelsior and, after a thorough consideration of all relevant factors, exercised its informed judgment. As the Supreme Court stated in *Citizens to Preserve Overton Park*, a reviewing court "is not empowered to substitute its judgment for that of the agency."[19]

IV. THE WEST RANGE SITE HAS SUPERIOR INFRASTRUCTURE TO SUPPORT NEW OR EXPANDED DEVELOPMENT UNDER THE IEP STATUTE.

While the West Range location has been properly designated by the IRR as possessing "adequate infrastructure," the West Range is Excelsior's *preferred* site for Mesaba Unit I because it, in fact, has *superior* infrastructure available to support development of an IGCC power station. MCGP's argument to the contrary is based on a narrow and illogical reading of the term "site" in the IEP statute. The statute requires the IRR to designate "a *site* that has substantial real property with adequate infrastructure to support new or expanded development."[20] Because Minnesota Statutes chapter 216B does not define "site," it is appropriate to look to the Power Plant Siting Rules definitions at Minnesota Rules part 4400.0200, which adopt a more expansive definition of "site" than the one apparently subscribed to by MCGP:

> Subp. 18. Site. "Site" means an area of land required for the construction, maintenance, and operation of a large electric power generating plant.
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> * * * *

[19] *Citizens to Preserve Overton Park, supra,* 401 U.S. at 416 (1971).

[20] Minn. Stat. § 216B.1694, subd. 1(3) (emphasis added).

> Subp. 6. Developed portion of the plant site. "Developed portion of the plant site" means the portion of the LEPGP site that is required for the physical plant and associated facilities.
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> Subp. 2a. Associated facilties. "Associated facilities" means buildings, equipment, and other physical structures that are necessary to the operation of a large electric power generating plant or a high voltage transmission line.[21]

Read together, these definitions result in a "site" that encompasses not just the fenced-in plant footprint, but any additional land required for associated facilities, including easements and right-of-way corridors to access infrastructure "necessary to the operation of a large electric power generating plant."

The term "site" in the IEP statute must be given this expansive reading because adequate infrastructure is required for "*new* or expanded development." Under MCGP's interpretation of "site," where all necessary infrastructure must apparently be located within the fenced-in plant footprint, the Legislature would have only provided for *expanded* development. *New* development, on the other hand, necessarily must allow for access to infrastructure outside the plant footprint because there is not an existing plant.

The West Range Site has ready access to all necessary infrastructure a short distance from the proposed IGCC power station footprint, including rail, natural gas, transmission interconnection, cooling water, wastewater discharge facilities, and highway transportation.[22] The existence of necessary infrastructure elements so close to the plant footprint will minimize the environmental impacts of the facility. It is precisely because of this superior infrastructure that the West Range Site is the preferred site in the permitting proceeding.

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[21] Minn. R. 4400.0200, subps. 2a, 6 and 18. *See also* 40 C.F.R. part 122.2 ("Site means the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility.").

[22] *See* Affidavit of Robert S. Evans II for a detailed description of the infrastructure located near the West Range property. *See also* Letter of Brian Hiti, Deputy Commissioner IRR to Christopher B. Clark, March 22, 2006 (attached as Exhibit D to MCGP's Motion for Summary Judgment).

CONCLUSION

For the reasons set forth above, Excelsior respectfully requests that MCGP's motion for summary judgment be denied.

Dated: October 3, 2006

Respectfully submitted,

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