

MPUC Docket No. E-6472-/M-05-1993

OAH Docket No. 12-2500-17260-2

BEFORE THE
MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE
MINNESOTA PUBLIC UTILITIES COMMISSION

127 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Petition of Excelsior Energy Inc.
and Its Wholly-Owned Subsidiary MEP-I, 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

**PREPARED REBUTTAL TESTIMONY AND EXHIBITS OF
EXCELSIOR ENERGY INC. AND MEP-I LLC**

JIM CHEN

OCTOBER 10, 2006

1 EXCELSIOR ENERGY, INC.

2 BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

3 PREPARED REBUTTAL TESTIMONY OF

4 JIM CHEN

5 **Q. Please state your name and address.**

6 A. My name is Jim Chen. I am the Associate Dean and James L. Krusemark Professor
7 of Law at the University of Minnesota Law School. I joined the Minnesota faculty in 1993
8 after graduating *magna cum laude* from the Harvard Law School in 1991, clerking for Judge
9 J. Michael Luttig of the United States Court of Appeals for the Fourth Circuit, and clerking
10 for Associate Justice Clarence Thomas of the Supreme Court of the United States. My
11 teaching assignments and research interests include the law of regulated industries,
12 constitutional law, administrative law, statutory interpretation, environmental law, and
13 natural resources law. I have written extensively about the law of regulated industries and
14 related legal issues, including legislative and regulatory incentives for technology change
15 and the behavior of incumbent utilities in the face of potential competition from new
16 technologies.¹ Federal courts, including the Supreme Court of the United States, have cited
17 my work on regulatory law.²

¹ See *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. (forthcoming 2007) (available at <http://papers.ssrn.com/abstract=771205>); *The Echoes of Forgotten Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUSTON L. REV. (forthcoming 2007) (available at <http://papers.ssrn.com/abstract=896303>); *Telecommunications Mergers, in Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries* (Peter Carstensen & Beth Farmer eds., Edward Elgar Publishing, Inc., forthcoming 2006); *Around the World in Eighty Centiliters*, 15 MINN. J. INT'L L. 1 (2006); *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005); *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 NW. U. L. REV. 1617 (2004); *Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls*, 2 TELECOMMS. & HIGH TECH. L.J. 307 (2003); *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003); *The Vertical Dimension of Cooperative Competition Policy*, 48 ANTITRUST BULL. 1005 (2003); *The Price of Macroeconomic Imprecision: How Should the Law Measure Inflation?*, 54 HASTINGS L.J. 1375 (2003); *Liberating Red Lion from the Glass Menagerie of Free Speech Jurisprudence*, 1 TELECOMMS. & HIGH TECH. L.J. 293 (2002); *The*

1 **Q. What is the purpose of your testimony?**

2 A. I am testifying on behalf of MEP-I LLC and Excelsior Energy Inc. (collectively
3 “Excelsior”), the developers of the Mesaba Energy Project (the “Project”), in connection
4 with Excelsior’s petition before the Minnesota Public Utilities Commission (the
5 “MPUC”) for approval of a power purchase agreement (“PPA”) with Xcel Energy under
6 the 2003 Omnibus Energy Bill (H.F. 9) passed by the Minnesota Legislature. I will focus
7 on the text, the legislative background, and the forward-looking, technologically
8 transformative public purposes of the Omnibus Energy Bill. In particular, I will focus on
9 the two provisions of the Omnibus Energy Bill at the heart of this proceeding: the
10 Innovative Energy Project (“IEP”) Statute, Minn. Stat. § 216B.1694, and the Clean
11 Energy Technology (“CET”) Statute, Minn. Stat. § 216B.1693. Together, the IEP Statute
12 and CET Statute comprise the “Minnesota IGCC Enabling Legislation.”

13 **Q. What materials have you reviewed in preparing your testimony?**

14 In preparing my testimony, I have reviewed the pleadings in this proceeding and
15 applicable statutes, regulations, and orders under federal and Minnesota law. In
16 particular, I offer testimony to help the MPUC as it evaluates the parties’ arguments
17 about the pivotal provisions of the 2003 Omnibus Energy Bill. I conclude that

Authority to Regulate Broadband Internet Access over Cable, 16 BERKELEY TECH. L.J. 677 (2001); *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921 (2000); *The Magnificent Seven: American Telephony’s Deregulatory Shootout*, 50 HASTINGS L.J. 1503 (1999); *The Second Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535 (1999); *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145 (1999); *TELRIC in Turmoil, Telecommunications in Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51 (1998); *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997); *Titanic Telecommunications*, 25 SW. U. L. REV. 535 (1996); *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415 (1996). An additional working paper, as yet unpublished, *Price-Level Regulation and Its Reform*, is available at <http://papers.ssrn.com/abstract=771226>.

²See *Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004); *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Marketing Bd.*, ___ F.3d ___, 2006 WL 2521188 (3d Cir., Sept. 1, 2006); *MCI Telecommunications Corp. v. Public Serv. Comm’n of Utah*, 216 F.3d 929, 933 (10th Cir. 2000); *Qwest Broadband Servs., Inc. v. City of Boulder*, 151 F. Supp. 2d 1236, 1241 (D. Colo. 2001); *Wisconsin Bell, Inc. v. Public Serv. Comm’n of Wisconsin*, 27 F.

1 Excelsior’s interpretation of the IEP and CET Statutes is the proper one, and that the
2 positions put forth by Xcel Energy in its Statement of the Case and related testimony
3 relating to the proper interpretation of the IEP and CET Statutes (such as the very
4 applicability of the IEP Statute in this proceeding and the relevance of Xcel’s own fluid
5 model of the forecasted need for new baseload generation, in light of a qualifying
6 innovative energy project’s statutory exemption from the requirements for a certificate of
7 need) cannot be supported under any defensible approach to statutory interpretation.

8 **Q. How is your testimony organized?**

9 A. My testimony is organized around six subject areas:

10 (1) Statutory interpretation – I focus on the text, structure, intent and
11 purpose behind the Minnesota IGCC Enabling Legislation. The interpretive
12 methodology that I outline in my testimony is faithful to Minn. Stat. §§ 645.16-.17,
13 which prescribes interpretive rules and presumptions that govern the
14 interpretation of statutes in this state. My methodology also reflects the deeper
15 traditions of statutory interpretation established by courts throughout the United
16 States, particularly by the Supreme Court of the United States.

17 (2) The requirements of the CET Statute – I address the statutory
18 definition of a “clean energy technology,” as well as the “likely least-cost resource”
19 and “contrary to the public interest” determinations that the MPUC is instructed to
20 undertake pursuant to Minn. Stat. § 216B.1693.

21 (3) The requirements of the IEP Statute – I outline the requirements for
22 approval by the MPUC of a PPA, the scope of the public interest standard that the

Supp. 2d 1149, 1153 (W.D. Wis. 1998).

1 MPUC is directed to apply, and the MPUC's powers to amend or modify the PPA.
2 All of these matters arise under Minn. Stat. § 216B.1694.

3 (4) The legislative context surrounding the passage of Minnesota's IGCC
4 Enabling Legislation – I place the IEP and CET statutes within their proper context
5 as part of a much larger energy policy agreement reached by the Minnesota
6 Legislature and Xcel Energy as the sole utility that owns nuclear generation capacity
7 in the state. I also describe the relevance of the Federal Energy Policy Act of 2005 to
8 the MPUC's public policy determination in this proceeding;

9 (5) PURPA analogy – The Minnesota IGCC Enabling Legislation
10 follows a proud tradition of forward-looking, technologically transformative
11 lawmaking in the United States. The IGCC Enabling Legislation was passed in
12 2003, on the 25th anniversary of the epochal Public Utilities Regulatory Policies Act
13 of 1978 (PURPA). The fortuitous timing is entirely appropriate, because a similar
14 set of public policy goals motivated both PURPA and the Minnesota IGCC Enabling
15 Legislation. These statutes demonstrate how legislative mandates can and do spur
16 innovation in regulated industries. Incumbent utilities' resistance to technology- and
17 market-driven change, which has obstructed the realization of these statutory
18 schemes, is another salient (if unfortunate) hallmark of PURPA and of Minnesota's
19 IGCC Enabling Legislation.

20 (6) The reaction of incumbent utilities – Finally, I address the ability of
21 incumbent utilities to offer credible commentary on the Mesaba Energy Project.
22 Incumbent utility companies and their shareholders have an overwhelming incentive
23 to maintain their monopolistic grip on all aspects of the electrical industry, including

1 the structurally competitive generation sector. Like any other incumbent, Xcel
2 Energy will stop at nothing to prevent new baseload generation from being provided
3 by an independent power company. In particular, Xcel’s statement of the case and
4 Judy Pofperl’s direct testimony offer interpretations of the relevant statutes that are so
5 implausible as to support only one inference: incumbent resistance by any means to
6 any competitive entry. It is imperative that the MPUC not allow utility self-interest
7 to supersede the public interest as embodied in the Minnesota IGCC Enabling
8 Legislation.

9 Statutory Interpretation

10 **Q. How should the MPUC analyze the CET Statute, IEP Statute, and the 2003 Omnibus**
11 **Energy Bill?**

12 A. The Minnesota legislature, through Minn. Stat. § 645.16, has prescribed the “object
13 of all interpretation and construction of laws” in this state:

14 *The object of all interpretation and construction of laws is to ascertain and effectuate*
15 *the intention of the legislature. Every law shall be construed, if possible, to give effect to all*
16 *its provisions.*

17 *When the words of a law in their application to an existing situation are clear and*
18 *free from all ambiguity, the letter of the law shall not be disregarded under the pretext of*
19 *pursuing the spirit.*

20 *When the words of a law are not explicit, the intention of the legislature may be*
21 *ascertained by considering, among other matters:*

22 *(1) The occasion and necessity for the law;*

23 *(2) The circumstances under which it was enacted;*

- 1 (3) *The mischief to be remedied;*
- 2 (4) *The object to be attained;*
- 3 (5) *The former law, if any, including other laws upon the same or similar subjects;*
- 4 (6) *The consequences of a particular interpretation;*
- 5 (7) *The contemporaneous legislative history; and*
- 6 (8) *Legislative and administrative interpretations of the statute.*

7 **Q. In ascertaining legislative intent, which presumptions should an interpreter of**
8 **Minnesota statutes adopt?**

9 A. Again, the Legislature, through Minn. Stat. § 645.17, has undertaken the task of
10 guiding statutory interpretation in this state by prescribing a set of interpretive
11 presumptions:

12 *In ascertaining the intention of the legislature the courts may be guided by the*
13 *following presumptions:*

- 14 (1) *The legislature does not intend a result that is absurd, impossible of*
15 *execution, or unreasonable;*
- 16 (2) *The legislature intends the entire statute to be effective and certain;*
- 17 (3) *The legislature does not intend to violate the constitution of the United States*
18 *or of this state;*
- 19 (4) *When a court of last resort has construed the language of a law, the*
20 *legislature in subsequent laws on the same subject matter intends the same construction*
21 *to be placed upon such language; and*
- 22 (5) *The legislature intends to favor the public interest as against any private*
23 *interest.*

1 **Q. Are these lists of factors and presumptions exclusive?**

2 A. No. Section 645.16 in particular describes its list as numbering “among other
3 factors.” These provisions are entirely consistent with the broader law of statutory
4 interpretation in the United States, particularly as it has been developed by the Supreme
5 Court of the United States.

6 **Q. May the MPUC consider the legislative history of the IGCC Enabling Legislation?**

7 A. Yes. The MPUC may consider the context in which the Minnesota Legislature
8 enacted this state’s IGCC Enabling Legislation, especially where, as here, resort to
9 legislative history reinforces rather than contradicts the plain meaning of the CET and IEP
10 Statutes.

11 **Q. May the MPUC consider other statutes, including federal statutes, when interpreting
12 the Minnesota IGCC Enabling Legislation and its constituent provisions?**

13 A. Yes. The consideration of related statutes and the broader policies they embody is a
14 time-honored technique in the law of statutory interpretation. *See, e.g., Lorillard v. Pons,*
15 *434 U.S. 575 (1978); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).* Resort to
16 related statutes as a source of linguistic meaning and of social policy at large is especially
17 appropriate here, given the close relationship between the Minnesota IGCC Enabling
18 Legislation and the federal Energy Policy Act of 2005. Moreover, to the extent that today’s
19 IGCC Enabling Legislation adopts a technologically transformative strategy pioneered by
20 PURPA, a 1978 federal statute renowned for its impact on innovation in the market for
21 electricity generation, it is entirely appropriate to revisit the history of PURPA.

22 **Q. May the MPUC consider the eventual impact of its interpretation of the IGCC
23 Enabling Legislation?**

1 A. Of course. Section 645.17 in particular reminds us that “[t]he legislature does not
2 intend a result that is absurd . . . or unreasonable.” Likewise, the MPUC should be mindful
3 that “[t]he legislature intends to favor the public interest as against any private interest.” *Id.*

4 **Q. Should the CET Statute, the IEP Statute, and the 2003 Omnibus Energy Bill be
5 construed in light of each other?**

6 A. Of course they should. It is a cardinal canon of statutory interpretation that statutes
7 *in pari materia*, let alone statutes as intimately related as these, should be interpreted in
8 harmony with one another. *E.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996);
9 *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

10 *CET Statute, Minn. Stat. § 216B.1693*

11 **Q. What are the basic provisions of Minnesota’s Clean Energy Technology Statute, Minn.
12 Stat. § 216B.1693?**

13 A. Section 216B.1693 consists of four subsections:

14 First, the subsection (a) of the CET Statute declares that a “utility that owns a nuclear
15 generating facility *shall* supply at least two percent of the electric energy provided to retail
16 customers from clean energy technology” (emphasis added) upon a finding by the MPUC
17 “that a clean energy technology is or is likely to be a least-cost resource, including the costs
18 of ancillary services and other generation and transmission upgrades necessary.”

19 Second, § 216B.1693(b) declares that “[e]lectric energy required by this section *shall*
20 be supplied by the innovative energy project defined” in the Minnesota IEP Statute
21 (emphasis added), “unless the commission finds do so contrary to the public interest.”

1 Third, § 216B.1693(c) defines “clean energy technology” as “a technology utilizing
2 coal as a primary fuel in a highly efficient combined-cycle configuration with significantly
3 reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of
4 traditional technologies.” It is undisputed that the technology employed by the Mesaba
5 Energy Project satisfies this statutory definition.

6 Fourth, the CET Statute by its own terms expires January 1, 2012. As I understand
7 the bases by which this proceeding is being contested, this subsection, § 216B.1693(d), is
8 also not a subject of serious dispute.

9 **Q. How does this statute affect a PPA involving electricity generated through clean energy
10 technology?**

11 A. The CET Statute prescribes a two-step process that leads ultimately to a PPA
12 involving electricity generated through clean energy technology. First, upon a finding by the
13 MPUC “that a clean energy technology is or is likely to be a least-cost resource,” subsection
14 (a) of the CET Statute requires “the utility that owns a nuclear generating facility” to “supply
15 at least two percent of the electric energy provided to retail customers from clean energy
16 technology.” This first step establishes a floor for electricity from clean energy technology
17 that a utility owning “a nuclear generating facility” *must* supply to retail customers.

18 The second step in the CET Statute involves the assignment of this two percent
19 threshold to a specific “innovative energy project” – namely, the project defined in
20 subdivision 1 of the IEP Statute, Minn. Stat. § 216B.1694, a legal provision I shall analyze in
21 due course. According to subsection (b) of the CET Statute, the clean technology electricity
22 required by the CET Statute *must* be supplied by the project defined in the IEP Statute,

1 barring an affirmative finding by the MPUC that this assignment is “contrary to the public
2 interest.”

3 **Q. What findings must the MPUC make in connection with a petition for approval of a**
4 **portion of the PPA under the CET Statute?**

5 A. The structure of the CET statute directs the MPUC to make two distinct findings:
6 (1) “that a clean energy technology is or is likely to be a least-cost resource” and (2) that the
7 assignment to a specific innovative energy project of the right to supply a two-percent share
8 of a nuclear-generating utility’s retail sales is not “contrary to the public interest.” These
9 findings serve two distinct purposes, each laid out by the plain language of the CET Statute:

10 (1) First, with respect to the question of whether “the utility that owns a
11 nuclear generating facility” must commit to supplying at least two percent of its electricity to
12 retail customers from clean energy technology, the MPUC must “find[] that a clean energy
13 technology is or is likely to be a least-cost resource.”

14 (2) Second, once the MPUC establishes the technological threshold that
15 triggers this supply obligation – namely, the finding “that a clean energy technology” is at
16 least “likely to be,” if not already *is*, “a least-cost resource,” the Commission must then
17 proceed to a determination of whether the project defined in the IEP statute is entitled to
18 supply the energy that satisfies the clean energy technology obligation. The MPUC must
19 assign to that innovative energy project the right to supply the energy in question “unless the
20 commission finds doing so contrary to the public interest.”

1 **Q. As to the first requirement, must the MPUC find that clean energy technology is *the***
2 **least-cost electric resource?**

3 A. No. To require such a finding would render meaningless the second half of the
4 statutory phrase, “is *or is likely to be* a least-cost resource” (emphasis added). Grammatical
5 elements connected by the disjunctive “or” must be given independent meaning. *See, e.g.,*
6 *Garcia v. United States*, 469 U.S. 70, 73 (1984); *FCC v. Pacifica Foundation*, 438 U.S. 726,
7 739-40 (1978); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). There really are legal
8 cases that depend on what the meaning of the word “is” is, *cf., e.g., Gwaltney of Smithfield,*
9 *Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 55-60 (1987) (holding that section 505 of the
10 Clean Water Act, 33 U.S.C. § 1365, which authorizes civil actions “against any person ...
11 who *is* alleged to be in violation of ... an effluent standard or limitation,” requires proof of
12 an ongoing violation), but this is not one of them. The Minnesota Legislature inserted the
13 phrase “or is likely to be” into the CET Statute, and that phrase must be given full effect. *Cf.*
14 Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to *all* its
15 provisions.” (emphasis added)); *id.* § 645.17(2) (“The legislature intends the entire statute to
16 be effective and certain”). A finding that clean energy technology, as defined in
17 § 216B.1693(c), “is likely to be a least coast resource” satisfies the CET Statute.

18 **Q. What is the MPUC’s authority under Minn. Stat. § 216B.1693(a) to set the percentage**
19 **of electric energy provided to retail customers from clean energy technology?**

20 A. Upon a finding by the MPUC that “a clean energy technology is or is likely to be a
21 least-cost resource,” subsection (a) of the CET Statute provides that “the utility that owns a
22 nuclear generating facility shall supply *at least two percent* of electric energy provided to
23 retail customers from clean energy technology” (emphasis supplied). In plain terms, this

1 provision sets a two percent floor on the amount of retail electric energy that must be
2 supplied from clean energy technology. The MPUC has discretion to raise, but not to lower,
3 this threshold. Quite evidently the Legislature intended to enable clean energy technology to
4 establish a foothold in the nuclear-generating utility's generation portfolio, so that clean
5 sources might begin displacing the utility's reliance on traditional nuclear and coal
6 technologies. By inserting the words "at least" into this formula, the Legislature explicitly
7 contemplated that the MPUC would exercise its expert discretion to raise the two percent
8 floor as changing technological, economic, social, or environmental factors might warrant.
9 Carbon regulation, for instance, represents the type of interest that might justify the MPUC's
10 exercise of this discretion to set a higher percentage.

11 **Q. As to the second determination, does the CET Statute's use of the phrase "[not]**
12 **contrary to the public interest" carry any legal significance?**

13 A. Yes. Notwithstanding Xcel Energy's assertions to the contrary (*see* Xcel Energy's
14 Statement of the Case, at 1 n.2), the CET Statute's use of this phrase is significant.
15 Subsection (b) of the CET Statute sets forth a simple, straightforward mandate: "Electric
16 energy required by this section shall be supplied by the innovative energy project" defined in
17 subdivision 1 of the IEP Statute. To negate this statutory command, the MPUC must make
18 an explicit finding that assigning the right to supply electric energy from clean energy
19 technology to the project described in the IEP Statute is "contrary to the public interest."
20 Placing the burden on Excelsior to demonstrate that the Mesaba Energy Project affirmatively
21 satisfies the public interest, as Xcel Energy sees the statute (*see* Xcel Energy's Statement of
22 the Case, at 3-4 & n.5), would effectively negate the evident legislative preference that
23 underlies the simple instruction, "Electric energy required by [the CET Statute] shall be

1 supplied by the innovative energy project defined in” the IEP Statute. This unwarranted
2 shifting of the burden would also undermine the IEP Statute’s exemption “from the
3 requirements for a certificate of need under section 216B.243.” Minn. Stat. § 216B.1694,
4 subd. 2(a)(1). As I have already observed, the CET and IEP statutes are *in pari materia* and
5 therefore must be construed in harmony with each other.

6 **Q. How should the MPUC conduct its public interest analysis?**

7 A. The phrase “public interest” (including virtual synonyms such as “public interest,
8 convenience, and necessity” and “public convenience and necessity”) is one of the most
9 ubiquitous and important verbal formulas in the law of regulated industries. The open-ended
10 phrase “public interest” takes its “meaning from the purposes of the regulatory legislation”
11 that defines the relevant agency’s responsibilities. *NAACP v. FPC*, 425 U.S. 662, 669
12 (1976); *accord, e.g., Office of Communication of the United Church of Christ v. FCC*, 707
13 F.2d 1413, 1427 (D.C. Cir. 1983); *Bilingual Bicultural Coalition on Mass Media, Inc. v.*
14 *FCC*, 595 F.2d 621, 628 & n.22 (D.C. Cir. 1978). Statutory “policy is the yardstick by
15 which the correctness of” a regulatory agency’s “actions will be measured.” *Schaffer*
16 *Transp. Co. v. United States*, 355 U.S. 83, 88 (1957). Although the public interest standard
17 is “a supple instrument for the exercise of discretion by [an] expert body,” it is likewise a
18 charter by which regulatory agencies are asked “to carry out ... legislative policy.” *FCC v.*
19 *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *accord FCC v. WNCN Listeners*
20 *Guild*, 450 U.S. 582, 593 (1981).

21 **Q. Please explain how the public interest standard binds a regulatory agency such as the**
22 **MPUC to heed statutory definitions of the “public interest.” In particular, may the**

1 **MPUC consider “extrastatutory” factors in making its “likely least cost determination”**
2 **under the CET Statute?**

3 A. The “public interest” standard is a creature of statutory law, and agencies and courts
4 must take special care not to exceed its bounds by injecting considerations not consistent
5 with or even foreclosed by a statute that invokes and safeguards the public interest. The
6 public interest “criterion is not to be interpreted as setting up a standard so indefinite as to
7 confer an unlimited power.” *Federal Radio Comm’n v. Nelson Bros. Bond & Mortgage Co.*,
8 289 U.S. 266, 285 (1933). Rather than indulge the “mistaken assumption that” a statutory
9 invocation of the public interest “is a mere general reference to public welfare without any
10 standard to guide determinations,” a state regulatory commission must confine its analysis to
11 “[t]he purpose of the [relevant statute], the requirements it imposes, and the context of the
12 provision[s] in question.” *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24
13 (1932). Indeed, the failure to adopt a “limiting standard, rationally related to the goals of the
14 Act,” in interpreting the public interest constitutes reversible error. *AT&T Corp. v. Iowa*
15 *Utils. Bd.*, 525 U.S. 366, 388 (1999); *accord Qwest Corp. v. FCC*, 258 F.3d 1191, 1202
16 (10th Cir. 2001).

17 *IEP Statute, Minn. Stat. § 216B.1694*

18 **Q. Subsection (b) of the CET Statute, Minn. Stat. § 216B.1693(b), refers to “the innovative**
19 **energy project defined in section 216B.1694, subdivision 1.” How does subdivision 1 of**
20 **the IEP Statute define this project?**

21 A. The IEP Statute defines “the term ‘innovative energy project’” as “a proposed
22 energy-generation facility or group of facilities which may be located on up to three sites.”
23 That facility or group of facilities must satisfy three criteria:

1 (1) First, the facility or group of facilities must “make[] use of an innovative
2 generation technology utilizing coal as a primary fuel in a highly efficient combined-cycle
3 configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and
4 mercury emissions from those of traditional technologies.” Minn. Stat. § 216B.1694,
5 subd. 1(1).

6 (2) Second, “the project developer” must certify that the project is “capable of
7 offering a long-term supply contract at a hedged, predictable cost.” Minn. Stat.
8 § 216B.1694, subd. 1(2).

9 (3) Third, “the commissioner of the Iron Range Resources and
10 Rehabilitation Board” must designate the project as one “that is located in the taconite tax
11 relief area on a site that has substantial real property with adequate infrastructure to support
12 new or expanded development and that has received prior financial and other support from
13 the board.” Minn. Stat. § 216B.1694, subd. 1(3).

14 **Q. Does a project that satisfies the IEP Statute’s definition of an “innovative energy
15 project” receive regulatory incentives?**

16 A. Yes. Subdivision 2(a) of the IEP Statute confers eight distinct “[r]egulatory
17 incentives” on an “innovative energy project”

18 (1) First, an IEP “is exempted from the requirements for a certificate of need under
19 section 216B.243, for the generation facilities, and transmission infrastructure associated
20 with the generation facilities.” The project remains “subject to all applicable environmental
21 review and permitting procedures of sections 116C.51 to 116C.69.” Minn. Stat.
22 § 216B.1694, subd. 2(a)(1).

1 (2) Second, an IEP, “once permitted and constructed, is eligible to increase the
2 capacity of the associated transmission facilities without additional state review upon filing
3 notice with the commission.” Minn. Stat. § 216B.1694, subd. 2(a)(2).

4 (3) Third, an IEP enjoys “the power of eminent domain” with respect “to the sites
5 and routes approved by the environmental quality board for the project facilities,” and
6 subject to the project’s obligation to “report any intent to exercise eminent domain authority
7 to the board.” Minn. Stat. § 216B.1694, subd. 2(a)(3).

8 (4) Fourth, an IEP “shall qualify as a ‘clean energy technology’ as defined in section
9 216B.1693.” Minn. Stat. § 216B.1694, subd. 2(a)(4).

10 (5) Fifth, “prior to the approval by the commission of any arrangement to build or
11 expand a fossil-fuel-fired generation facility, or to enter into an agreement to purchase
12 capacity or energy from such a facility for a term exceeding five years,” an IEP “shall ... be
13 considered as a supply option for the generation facility.” Moreover, the IEP Statute directs
14 the MPUC to “ensure such consideration and take any action with respect to such supply
15 proposal that it deems to be in the best interest of ratepayers.” Minn. Stat. § 216B.1694,
16 subd. 2(a)(5).

17 (6) Sixth, the IEP Statute’s sixth “[r]egulatory incentive” actually imposes a modest
18 obligation on an IEP. Minn. Stat. § 216B.1694, subd. 2(a)(6) directs an IEP to “make a good
19 faith effort to secure funding from the United States Department of Energy and the United
20 States Department of Agriculture to conduct a demonstration project at the facility for either
21 geologic or terrestrial carbon sequestration projects to achieve reductions in facility
22 emissions or carbon dioxide.”

1 (7) Seventh, an IEP “shall be entitled to enter into a contract with a public utility that
2 owns a nuclear generation facility in the state to provide 450 megawatts of baseload capacity
3 and energy under a long-term contract, subject to the approval of the terms and conditions of
4 the contract by the commission.” Minn. Stat. § 216B.1694, subd. 2(a)(7). The IEP Statute
5 authorizes the MPUC to “approve, disapprove, amend, or modify the contract in making its
6 public interest determination, taking into consideration the project's economic development
7 benefits to the state; the use of abundant domestic fuel sources; the stability of the price of
8 the output from the project; the project's potential to contribute to a transition to hydrogen as
9 a fuel resource; and the emission reductions achieved compared to other solid fuel baseload
10 technologies.” *Id.*

11 (8) Eighth and finally, an IEP “shall be eligible for a grant from the renewable
12 development account, subject to the approval of the entity administering that account, of
13 \$2,000,000 a year for five years for development and engineering costs, including those
14 costs related to mercury-removal technology; thermal efficiency optimization and emission
15 minimization; environmental impact statement preparation and licensing; development of
16 hydrogen production capabilities; and fuel cell development and utilization.” Minn. Stat.
17 § 216B.1694, subd. 2(a)(8).

18 In the balance of my testimony regarding the IEP Statute, I shall focus on subsections
19 2(a)(1) and 2(a)(7), which respectively “exempt[]” an IEP “from the requirements for a
20 certificate for need” and “entitle[]” an IEP “to enter into a contract with a public utility that
21 owns a nuclear generation facility in the state to provide 450 megawatts of baseload capacity
22 and energy under a long-term contract.”

1 **Q. What does it mean to say that an innovative energy project is “exempt from the**
2 **requirements for a certificate of need”?**

3 A. The IEP Statute exempts an innovative energy project from Minn. Stat. § 216B.243.
4 Subdivision 2 of that statute, which prescribes certificates of need for large energy facilities
5 except where otherwise provided by state law, declares that “[n]o large energy facility shall
6 be sited or constructed in Minnesota without the issuance of a certificate of need by the
7 commission pursuant to sections 216C.05 to 216C.30 and this section and consistent with the
8 criteria for assessment of need.”

9 Subdivision 3 of the certificate of need statute outlines twelve criteria by which the
10 MPUC must assess the need for construction of a “proposed large energy facility,” which the
11 statute defines as a “show[ing],” at a minimum, by “the applicant ... that demand for
12 electricity cannot be met more cost effectively through energy conservation and load-
13 management measures.” Minn. Stat. § 216B.243, subd. 3. Under subdivision 3, the
14 commission’s assessment of need “shall evaluate” the following twelve factors:

15 *(1) the accuracy of the long-range energy demand forecasts on which the necessity*
16 *for the facility is based;*

17 *(2) the effect of existing or possible energy conservation programs under sections*
18 *216C.05 to 216C.30 and this section or other federal or state legislation on long-term*
19 *energy demand;*

20 *(3) the relationship of the proposed facility to overall state energy needs, as*
21 *described in the most recent state energy policy and conservation report prepared under*
22 *section 216C.18, or, in the case of a high-voltage transmission line, the relationship of the*

1 *proposed line to regional energy needs, as presented in the transmission plan submitted*
2 *under section 216B.2425;*

3 *(4) promotional activities that may have given rise to the demand for this facility;*

4 *(5) benefits of this facility, including its uses to protect or enhance environmental*
5 *quality, and to increase reliability of energy supply in Minnesota and the region;*

6 *(6) possible alternatives for satisfying the energy demand or transmission needs*
7 *including but not limited to potential for increased efficiency and upgrading of existing*
8 *energy generation and transmission facilities, load-management programs, and distributed*
9 *generation;*

10 *(7) the policies, rules, and regulations of other state and federal agencies and local*
11 *governments;*

12 *(8) any feasible combination of energy conservation improvements, required under*
13 *section 216B.241, that can (i) replace part or all of the energy to be provided by the*
14 *proposed facility, and (ii) compete with it economically;*

15 *(9) with respect to a high-voltage transmission line, the benefits of enhanced*
16 *regional reliability, access, or deliverability to the extent these factors improve the*
17 *robustness of the transmission system or lower costs for electric consumers in Minnesota;*

18 *(10) whether the applicant or applicants are in compliance with applicable*
19 *provisions of sections 216B.1691 and 216B.2425, subdivision 7, and have filed or will file by*
20 *a date certain an application for certificate of need under this section or for certification as*
21 *a priority electric transmission project under section 216B.2425 for any transmission*
22 *facilities or upgrades identified under section 216B.2425, subdivision 7;*

1 (11) whether the applicant has made the demonstrations required under subdivision
2 3a; and

3 (12) if the applicant is proposing a nonrenewable generating plant, the applicant's
4 assessment of the risk of environmental costs and regulation on that proposed facility over
5 the expected useful life of the plant, including a proposed means of allocating costs
6 associated with that risk.

7 At an absolute minimum, the certificate of need exemption that an innovative energy
8 project enjoys under subdivision 2(a)(1) of the IEP Statute means that the twelve factors
9 bearing on the putative need for a proposed large energy facility, as outlined in Minn. Stat.
10 § 216B.243, subdivision 3, are *not* appropriate in a proceeding arising under the IEP Statute
11 and may not be lawfully applied to an innovative energy project that qualifies for the
12 regulatory incentives conferred by subdivision 2 of the IEP Statute. In all branches of
13 administrative law, in Minnesota as in the federal legal system, regulatory agencies are
14 directed by statute to base their decisions “on a consideration of the relevant factors.”
15 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). In some instances,
16 “consideration of the relevant factors” demands that *improper* factors be excluded from the
17 legal decision at hand. This is one such instance.

18 It is a cardinal rule of statutory interpretation that one statute should not be
19 interpreted so as to undermine another. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46
20 (1997). This is an extension of the rule against surplusage, *see, e.g., United States v. Alaska*,
21 521 U.S. 1 (1997); *Western Union Tel. Co. v. Lenroot*, 323 U.S. 490 (1945), applied to the
22 structure and fabric of an entire statutory scheme (such as the law of regulated electric
23 utilities in Minnesota), as opposed to a single subject. In Minnesota, the instinctive rejection

1 of statutory surplusage is given legislative voice in statutory provisions governing the
2 enterprise of statutory interpretation in this state. “Every law shall be construed, if possible,
3 to give effect to *all* its provisions.” Minn. Stat. § 645.16 (emphasis added). Moreover,
4 section 645.17(2) directs courts to presume that “[t]he legislature intends the entire statute to
5 be effective and certain.”

6 What is at stake in this interpretive controversy transcends the minimal threshold of
7 cogency in ordinary disputes over statutory construction. On this question of interpretation
8 hinges the very effectiveness of the IEP Statute. The IEP Statute blocks the application of
9 the certificate of need statute to an innovative energy project, precisely because the
10 Legislature has concluded that subjecting an IEP to the certificate of need process would
11 obstruct the legislatively proclaimed public interest in technological innovation in the field of
12 electricity generation. In a proceeding involving a project that qualifies for the regulatory
13 incentives provided by the IEP Statute, the application of factors appropriate to a certificate
14 of need application under Minn. Stat. § 216B.243 would annihilate any regulatory benefit
15 that the Legislature intended to confer upon innovative energy projects. If found, any one
16 among three distinct sources of statutory incompatibility – operational conflict, philosophical
17 tension, or structural derogation – provides more than an adequate basis for rejecting a
18 proposed interpretation of a statute. *See Robinson*, 519 U.S. at 345-46.

19 In this case, the application of certificate of need factors to a proceeding arising
20 under the IEP Statute constitutes a triple threat. The invocation of factors pertinent to a
21 certificate of need proceeding renders it operationally impossible for the MPUC to honor the
22 IEP Statute’s exemption. The two provisions’ underlying philosophies are at war with each
23 other: whereas a certificate of need proceeding demands that a proponent of a new energy

1 facility demonstrate the need for that facility, the IEP Statute is consciously designed to spur
2 the construction of innovative energy projects. Finally, to apply certificate of need factors
3 represents structural derogation of the worst sort. It effectively repeals one of the most
4 important regulatory incentives in the IEP Statute before this provision has ever had an
5 opportunity to yield the sort of technological innovation that the Minnesota Legislature
6 hoped to inspire through passage of the 2003 Omnibus Energy Bill.

7 **Q. Does subdivision 2(a)(1)'s certificate-of-need exemption attach to any particular**
8 **company?**

9 A. No. The exemption appropriately applies to the project itself (including its
10 "generation facilities, and [the] transmission infrastructure associated with [those] generation
11 facilities") rather than the project's developer, owner, or operator. Elsewhere, the IEP
12 Statute speaks of "the project developer or owner," a term whose variation from the
13 "project" proper is legally meaningful. *See* Minn. Stat. § 216B.1694, subd. 1(2). *Expressio*
14 *unius est exclusio alterius*: to express one thing is to exclude another. *E.g., Leatherman v.*
15 *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Chan v.*
16 *Korean Airlines, Ltd.*, 490 U.S. 122 (1989).

17 **Q. Does the IEP Statute entitle an innovative energy project to enter a PPA with an**
18 **incumbent electric utility?**

19 A. Yes, emphatically. Perhaps the most important regulatory incentive conferred by the
20 IEP Statute resides in subdivision 2(a)(7):

21 *An innovative energy project ... shall be entitled to enter into a contract with*
22 *a public utility that owns a nuclear generation facility in the state to provide 450*
23 *megawatts of baseload capacity and energy under a long-term contract, subject to*

1 *the approval of the terms and conditions of the contract by the commission. The*
2 *commission may approve, disapprove, amend, or modify the contract in making its*
3 *public interest determination, taking into consideration the project’s economic*
4 *development benefits to the state; the use of abundant domestic fuel sources; the*
5 *stability of the price of the output from the project; the project’s potential to*
6 *contribute to a transition to hydrogen as a fuel resource; and the emission*
7 *reductions achieved compared to other solid fuel baseload technologies*

8 As is evident from its text, this provision consists of two prongs. First, an IEP is
9 entitled by right to enter a long-term contract “to provide 450 megawatts of baseload
10 capacity and energy under a long-term contract” to a nuclear-generating electric utility in
11 Minnesota. This contractual right is “subject to the approval of the terms and conditions of
12 the contract by the commission.” The subsection’s second sentence then prescribes five
13 factors that the MPUC must “tak[e] into consideration” as it “mak[es] its public interest
14 determination” and weighs whether to “approve, disapprove, amend, or modify the
15 contract.”

16 **Q. What factors must the MPUC consider in making a “public interest” determination**
17 **under subdivision 2(a)(7) of the IEP Statute, Minn. Stat. § 216B.1694, subd. 2(a)(7)?**

18 A. As I described in connection with my discussion of the CET Statute, the “public
19 interest” analysis that lies at the heart of virtually every statute in the law of regulated
20 industries must proceed on the basis of factors listed in that statute. The language of Minn.
21 Stat. § 216B.1694, subd. 2(a)(7), could not be plainer. The IEP Statute prescribes five
22 specific factors bearing on the MPUC’s “public interest determination”:

23 (1) “the project’s economic development benefits to the state”

1 (2) “the use of abundant domestic fuel sources”

2 (3) “the stability of the price of the output from the project”

3 (4) “the project’s potential to contribute to a transition to hydrogen as a fuel
4 resource”

5 (5) “the emission reductions achieved compared to other solid fuel baseload
6 technologies”

7 **Q. What role does the cost of a PPA play in the “public interest” determination under the
8 IEP Statute?**

9 A. As I discussed in connection with subdivision 2(a)(1) of the IEP statute, the proper
10 application of a regulatory statute’s “public interest” standard sometimes demands the
11 *exclusion* of improper factors that do not belong in this analysis. Although the cost of a
12 project, at least when it affects the price that consumers pay for its output, is ordinarily a
13 component of the public interest, *see, e.g., Schaffer Transp. Co. v. United States*, 355 U.S.
14 83, 91 (1957); *Dixie Carriers, Inc. v. United States*, 351 U.S. 56, 59 (1956); *ICC v.*
15 *Mechling*, 330 U.S. 567, 575 (1947), cost plays a legally circumscribed role in the public
16 interest determination that the MPUC is directed to conduct under subdivision 2(a)(7) of the
17 IEP Statute. I base my evaluation of the statute in this regard on no fewer than four pieces of
18 statutory evidence, all of them structural in the sense that they rely on the relationship
19 between subdivision 2(a)(7) and other provisions of the IGCC Enabling Legislation.

20 First, as I have already discussed at great length, the IEP Statute operates in tandem
21 with the CET Statute. For its part, the CET Statute contemplates that qualifying technology
22 that satisfies Minn. Stat. §§ 216B.1693(b) and 216B.1694, subd. 1, may well *not* be the
23 cheapest available source of electricity in the short run. The CET Statute becomes operative

1 upon a finding by the MPUC “that a clean energy technology is *or is likely to be* a least-cost
2 resource.” *Id.* § 216B.1693(a) (emphasis added). Clean energy technology does need to
3 show promise for becoming a “least-cost resource,” but the IGCC Enabling Legislation by
4 no means demands that demonstration on a here-and-now basis.

5 Second, the portion of the IEP Statute incorporated by reference into subsection (b)
6 of the CET Statute reinforces the inference that the Minnesota Legislature did not intend to
7 demand an immediate demonstration of low cost. Subdivision 1(2) of the IEP Statute directs
8 “the project developer or owner” to “certif[y]” that the “project [is] *capable* of offering a
9 long-term supply contract at a *hedged, predictable cost*” (emphases added). Again, the
10 suggestion is that of gradual (albeit foreseeable) technological evolution along a curve that
11 will *eventually* permit clean energy technology (as defined in § 216B.1693) and an
12 innovative energy project (as defined in § 216B.1964) to meet more stringent cost-based
13 demands. Evidently mindful that infant technologies, at least in their cradles, are not likely
14 to meet or beat legacy technologies on the basis of cost, the Legislature elected not to impose
15 this threshold in either half of the IGCC Enabling Legislation.

16 Third, subdivision 2(a)(8) of the IEP Statute declares that an innovative energy
17 project “shall be eligible for a grant from the renewable development account ... of
18 \$2,000,000 a year for five years for development and engineering costs, including those
19 costs related to mercury-removal technology; thermal efficiency optimization and emission
20 minimization; environmental impact statement preparation and licensing; development of
21 hydrogen production capabilities; and fuel cell development and utilization.” It would seem
22 incongruous for the Legislature to authorize \$10 million in developmental subsidies for an
23 infant industry even as the Legislature insists on a strict form of cost-based evaluation of that

1 very industry’s pilot project. Indeed, the record underlying the passage of the IGCC
2 Enabling Legislation demonstrates that the Legislature had no such thing in mind. An
3 October 5, 2004, letter from Representative Mike Beard and Senator David Tomassoni
4 confirms the Legislature’s understanding that any innovative energy project would face
5 “higher development costs associated with advanced technology, a key barrier to entry of the
6 IGCC technology into the generation mix.”

7 Fourth and finally, there is indirect evidence that the Legislature knows precisely
8 how to direct an inquiry into cost or ratepayer protection when it chooses to do so.
9 Subdivision 2(a)(5) of the IEP Statute, Minn. Stat. § 216B.1694, subd. 2(a)(5), directs the
10 MPUC to consider an IEP “as a supply option for the generation facility” at issue in any
11 proposal “to build or expand a fossil-fuel-fired generation facility, or to enter an agreement to
12 purchase capacity or energy from such a facility for a term exceeding five years.” This
13 subdivision proceeds to instruct the MPUC to “take any action with respect to such supply
14 proposal that it deems to be *in the best interest of ratepayers*” (emphasis added).

15 In different provisions, the IEP Statute speaks of “a certificate of need,” “the best
16 interest of ratepayers,” and the “public interest.” Compare Minn. Stat. § 216B.1694,
17 subd. 2(a)(1) (exempting an IEP from “the requirements for a certificate of need”) and *id.*
18 subd. 2(a)(5) (“the best interest of ratepayers”) with *id.* subd. 2(a)(7) (“public interest”). All
19 of these provisions, in turn, are distinct from the CET Statute’s reference to clean energy
20 technology as a “likely ... least-cost resource.” Though frequently related in other
21 manifestations of the law of regulated industries, these terms are given very distinct and, at
22 least in the case of the certificate of need, affirmatively contradictory roles to play within the

1 intricate and delicately balanced regulatory system established by the IGCC Enabling
2 Legislation.

3 **Q. What is the scope of the MPUC’s authority to “approve, disapprove, amend or modify**
4 **the [PPA] contract” under the IEP statute?**

5 A. This authority appears to be governed by subdivision 2(a)(7)’s directive that the
6 Commission make a “public interest determination,” as informed by the five factors stated in
7 the second sentence of this provision. Subject to those factors and the public interest
8 determination that they modulate, the Commission appears to have plenary authority over
9 “the terms and conditions of the contract,” including but not limited to the purchase price
10 and the extent of the baseload capacity and/or energy covered by the long-term PPA.

11 **Q. Does the MPUC have authority to amend or modify the amount of megawatts provided**
12 **under a PPA as a condition for its approval under the IEP Statute?**

13 A. Yes. The plain language of subdivision 2(a)(7), reinforced by the altogether
14 reasonable expectation that the MPUC might need to amend or modify the IEP Statute’s
15 default reference to “450 megawatts of baseload capacity and energy” in light of rapid and
16 previously unanticipated changes in what is after all *innovative* energy technology,
17 authorizes the MPUC to “approve, disapprove, amend or modify the contract” in furtherance
18 of the public interest.

19 **Q. Xcel’s Statement of the Case asserts at p. 2: “Contrary to Excelsior’s claims, Minn.**
20 **Stat. § 216B.1694, subd. 2(a)(7) does not apply. The statute explicitly limits**
21 **consideration to a ‘450MW’ PPA to fall within its terms. Excelsior does not seek**
22 **approval of a 450 MW PPA, Excelsior exclusively seeks approval of a 603 MW PPA;**
23 **thus its claims of ‘entitlement to a power purchase agreement’ with Xcel Energy under**

1 **that statute are without merit.” Do you agree with that interpretation of the IEP**
2 **Statute?**

3 A. No. This specious argument is so lacking in merit that it approaches (if not
4 altogether transgresses) the boundary that separates serious from frivolous legal advocacy.
5 Xcel would discard an entire statutory provision – arguably the most valuable portion of the
6 legislative package embodied in the IGCC Enabling Legislation, at least in terms of its
7 ability to spur the actual development and deployment of innovative energy technologies –
8 on the sole ground that the PPA proposed in connection with this subdivision contemplates
9 an economically and technologically preferable footprint that deviates from the 450
10 megawatt figure designated in the statute.

11 The IEP Statute’s reference to 450 megawatts cannot be plausibly described as a
12 procrustean demand on which subdivision 2(a)(7)’s entitlement to a long-term contract
13 hinges on an all-or-nothing basis. Such a miserly – not to mention perverse and unnatural –
14 reading of the statute would nullify the Legislature’s instruction that the MPUC exercise its
15 discretion to “approve, disapprove, amend or modify the [proposed] contract.” The
16 commission’s power over the terms and conditions of the contract, let alone its obligation to
17 advance the public interest and the IEP Statute as a whole, would be meaningless if the
18 pivotal entitlement conferred by the IGCC Enabling Legislation could be defeated as easily
19 as an incumbent utility’s complaint that the proposed project targets an economically and
20 technologically sensible size rather than the 450 megawatt figure that the Legislature rather
21 obviously designated as the starting point, not the ultimate and indispensable goal, of a round
22 of regulatory decisionmaking on clean energy technologies and innovative energy projects.

1 Notably, in a provision of the Energy Policy Act of 2005 to which I will soon devote
2 more extensive attention, the United States Congress understood the natural and plain
3 meaning of subdivision 2(a)(7) of Minnesota’s IEP Statute to grant a right “to enter into a
4 long-term contract approved by a State public utility commission to sell *at least 450*
5 *megawatts* of output to a utility.” Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XVII,
6 § 1703(c)(1)(C), 119 Stat. 594, 1121 (emphasis added). Accepting Xcel’s laughable
7 interpretation of subdivision 2(a)(7) would have the legally incidental but economically
8 significant effect of negating a loan guarantee authorization under federal law.

9 Minnesota law unequivocally directs courts and other interpreters of this state’s
10 statutes to presume that “[t]he legislature does not intend a result that is absurd, impossible
11 of execution, or unreasonable.” Minn. Stat. § 645.17(1). In an argumentative package
12 notable for its disregard of legal reasoning and common sense, Xcel’s bootless attempt to
13 undermine subdivision 2(a)(7) of the IEP Statute figures prominently as one of the utility’s
14 weakest objections in this proceeding.

15 *Legislative context underlying the passage of Minnesota’s IGCC Enabling Legislation*

16 **Q. Why was there an Omnibus Energy Bill in 2003?**

17 A. Seeking to extend operation of its Prairie Island nuclear generation facility beyond
18 2007, Xcel Energy needed authorization from the Minnesota Legislature to add dry cask
19 storage at Prairie Island. (A helpful description of the circumstances surrounding Xcel’s
20 ongoing regulatory efforts to secure storage for its nuclear waste is available at
21 <http://www.leg.state.mn.us/lrl/issues/prairieisland.asp>.) During the 2003 legislative session,
22 Xcel requested legislative approval to build additional storage at Prairie Island. In addition,
23 as part of its proposed Metropolitan Emission Reduction Program (MERP), Xcel was

1 working with a number of stakeholders to implement a plan to convert two metropolitan
2 coal-fueled power plants to natural gas and to invest in capital improvements to reduce
3 emissions from its King plant on the St. Croix River.

4 Xcel proposed approximately \$1 billion of total investment in connection with
5 MERP. Before Xcel would agree to proceed with the plan, however, Xcel wanted to secure
6 a legislative guarantee that the utility could recover its investment currently through a rate
7 rider. To accommodate Xcel's requests, the Legislature passed an Omnibus Energy Bill that
8 not only addressed the utility's desire for financial security, but also raised a number of other
9 important initiatives on energy policy. Among those initiatives was the IGCC Enabling
10 Legislation.

11 **Q. How did Xcel and its shareholders benefit from the 2003 Omnibus Energy Bill?**

12 A. The 2003 Omnibus Energy Bill allowed Xcel to continue operating its Prairie Island
13 nuclear plant beyond 2007. The bill also authorized the rate recovery mechanism sought by
14 Xcel in connection with MERP. This rate recovery mechanism effectively guaranteed that
15 Xcel would recover its investments in MERP.

16 **Q. Were the IEP and CET Statutes part of the 2003 Omnibus Energy Bill?**

17 A. Yes. As I am about to explain, the IGCC Enabling Legislation represented a pivotal
18 portion of that year's Omnibus Energy Bill.

1 **Q. Is it reasonable to assume that by adopting the IEP and CET Statutes as part of the**
2 **2003 Omnibus Energy Bill the legislature thought the clean coal technology described**
3 **in those statutes would be supported by Xcel in exchange for the many**
4 **accommodations made to Xcel in the 2003 Omnibus Energy Bill?**

5 A. This inference is not merely reasonable. The legislative record underlying the
6 deliberation and passage of the 2003 Omnibus Energy Bill makes it clear that the
7 Legislature, Governor Tim Pawlenty, and Xcel all regarded Prairie Island’s dry cask storage
8 provisions and the MERP-related rate recovery mechanism as part of a legislative “package
9 deal.”

10 On May 23, 2003, Governor Pawlenty reviewed H.F. 9 as it was originally passed by
11 the House. In a letter to Minnesota’s Senators, the Governor declared H.F. 9 in its then-
12 current form “unacceptable.” Governor Pawlenty specifically objected to the bill’s
13 provisions that would “allow[] new coal technologies to be counted towards a utility’s
14 Renewable Energy Objective.” In place of this offending provision, the Governor signaled
15 his support for the “coal-gasification technology proposed for the Excelsior Energy project”
16 as a way of “provid[ing] base-load power with clean emissions” and “helping pave the way
17 for a better energy future.” He also touted the project’s ability to “provide[] economic
18 development opportunities in a region of the state that has suffered significant job losses.”
19 The Governor’s letter concluded that a revised bill removing “coal ... from the renewable
20 energy classification” and including “other incentives for the Excelsior Energy project ...
21 would be acceptable.”

22 After the enactment of the 2003 Omnibus Energy Bill, letters from representatives of
23 the House, the Senate, and the Governor’s office all confirmed this understanding of the Bill

1 and, in particular, the central importance of the IEP provisions to the political consensus that
2 enabled the Bill to become the binding law of Minnesota. Representative Mike Beard,
3 Senator Tomassoni, Speaker of the House Steve Sviggum, and Governor's Chief of Staff
4 Charlie Weaver all wrote MPUC Chairman Leroy Koppendrayner to confirm the
5 understanding of the circumstances giving rise to the inclusion of the IEP provisions in the
6 Omnibus Energy Bill. The October 5, 2004, letter signed by Representative Beard and
7 Senator Tomassoni specifically mentioned the Mesaba Energy Project and its compliance
8 with the Legislature's hope that the IGCC Enabling Legislation would "encourage the
9 development of an IGCC plant in Northeastern Minnesota, because of the significant
10 benefits such a project would bring to Minnesota's consumers, economy and environment."

11 **Q. Are you familiar with the federal Energy Policy Act of 2005 ("EPAct 2005") and its**
12 **provisions supporting IGCC technology?**

13 A. Yes. I have reviewed in particular the portions of EPAct 2005 that create tax
14 incentives and authorize a general loan guarantee program to support development of large
15 baseload IGCC power plants, as well as the specific loan guaranty authorization in EPAct
16 2005 for the Mesaba Energy Project. Title XVII of the Energy Policy Act of 2005, Pub. L.
17 No. 109-58, tit. XVII, § 1703(c), 119 Stat. 594, 1120-22, authorized the Secretary of Energy
18 to make loan guarantees for integrated gasification combined cycle projects. Section
19 1703(c)(1)(C) refers specifically to "a project located in a taconite-producing region of the
20 United States that is entitled under the law of the State in which the plant is located to enter
21 into a long-term contract approved by a State public utility commission to sell at least 450
22 megawatts of output to a utility." 119 Stat. at 1121. The "project described in section
23 1703(c)(1)(C)" is then singled out as a project to which the Department of Energy may issue

1 “a loan guarantee, to the extent that the amounts” awarded under the Clean Coal Power
2 Initiative “have not yet been disbursed to, or have been repaid by, the recipient.” *Id.*
3 § 1704(b), 119 Stat. at 1122, *as amended* by Pub. L. No. 109-168, § 1(b)(2), 119 Stat. 3580,
4 3580.

5 **Q. What impact, if any, does passage of EAct 2005 and its specific provisions supporting**
6 **the Mesaba Energy Project have on the MPUC’s analysis of the proposed PPA in this**
7 **docket?**

8 A. The EP Act provisions supporting IGCC technology generally and the Mesaba
9 Energy Project in particular validate everything that the Minnesota legislature did in enacting
10 the IGCC Enabling Legislation in 2003. A more carefully targeted federal loan guarantee
11 could not possibly be imagined; section 1703(c)(1)(C) in particular so carefully specifies the
12 Mesaba Energy Project that this federal provision sheds light on the proper interpretation of
13 Minn. Stat. § 216B.1694, subd. 2(a)(7). By committing substantial federal funds in support
14 of integrated gasification projects, Congress has plainly concluded that IGCC is an important
15 way for the United States to continue using its most abundant domestic fuel source, coal, for
16 power generation. Minnesota’s congressional delegation has joined this state’s own
17 legislators in expressing their enthusiastic support for Excelsior’s Mesaba Energy Project. I
18 have reviewed letters by Senator Norm Coleman, Representative James L. Oberstar,
19 Representative Jim Ramstad, State Speaker Steve Sviggum, State Representative Mike
20 Beard, and State Senator David J. Tomassoni to Secretary of Energy Samuel L. Bodman and
21 Secretary of the Treasury John W. Snow, all in enthusiastic support for Excelsior’s
22 application for federal tax credits under EAct 2005. This federal funding, needless to say,
23 hinges heavily on the MPUC’s approval of Excelsior’s proposed PPA.

1 **Q. Are other states poised to seize national leadership in the development and deployment**
2 **of integrated gasification combined cycle projects?**

3 A. Yes. I am aware of IGCC initiatives in West Virginia, Illinois, Indiana, New York,
4 Pennsylvania, Wisconsin, and California. In this proceeding, Minnesota has an opportunity
5 to seize national leadership in the development and deployment of IGCC technology. If our
6 state does not exploit the opportunities, other states surely will.

7 PURPA Analogy

8 **Q. Has either Minnesota or the federal government ever relied on regulatory reform,**
9 **including legal mechanisms requiring incumbent utilities to purchase electricity from**
10 **their rivals, to spur technological change in a regulated industry?**

11 A. Yes, and with striking success. Avoided cost pricing under the Public Utilities
12 Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117 (codified as
13 amended in scattered sections of 15, 16, 30, 42, and 43 U.S.C.), represents the leading
14 example of technology-forcing through regulatory reform. The Federal Energy Regulatory
15 Commission (FERC) adopted the so-called full avoided cost rule in response to PURPA's
16 cogeneration and small power production provisions. Although price ceilings have often
17 figured prominently in regulatory reform,³ PURPA and the full avoided cost rule stand out
18 because of FERC's conscious effort to change the trajectory of technological evolution in
19 electric generation. In the eyes of contemporary observers, PURPA was "one of the grand
20 policy experiments of [its] generation." Deirdre O'Callaghan & Steve Greenwald, *PURPA*

³Compare, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968) (upholding the Federal Power Commission's use of maximum area rates in an effort to stimulate natural gas exploration and production) and *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983) (describing "new statutory rates" for natural gas as "intended to provide investors with adequate incentives to develop new sources of supply") with, e.g., *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1509-10 (D.C. Cir.) (invalidating an above-market price ceiling as an unlawful abandonment of FERC's statutory obligation to set "just and reasonable" rates), *cert. denied*, 469 U.S. 1034

1 *from Coast to Coast: America's Great Electricity Experiment*, 10 WTR NAT. RESOURCES &
2 ENV'T 17, 17 (1996).

3 Section 210 of PURPA directed FERC to prescribe, within a year of the statute's
4 enactment, rules requiring electric utilities to purchase power from qualifying cogeneration
5 and small power production facilities. *See* 16 U.S.C. § 824a-3(a); *American Paper Inst., Inc.*
6 *v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983). These producers came to
7 be known as “qualifying facilities,” or “QFs” for short. The statutory requirements
8 governing the pricing of purchases from QFs have remained unchanged since PURPA’s
9 passage in 1978. First, rates for electricity purchased from QFs “shall be just and reasonable
10 to the electric consumers of the electric utility and in the public interest.” 16 U.S.C. § 824a-
11 3(b)(1). Second, such rates “shall not discriminate against qualifying cogenerators or
12 qualifying small power producers.” *Id.* § 824a-3(b)(2). Finally, FERC may not “prescribe[]
13 ... a rate which exceeds the incremental cost to the electric utility of alternative electric
14 energy.” *Id.* § 824a-3(b). Such “incremental cost,” also known as “avoided cost,” is the cost
15 to an “electric utility of the electric energy which, but for the purchase from a cogenerator or
16 small power producer, such utility would generate or purchase from another source.” *Id.*
17 § 824a-3(d); *see also* 18 C.F.R. § 292.101(b)(6) (defining “avoided cost” in almost exactly
18 these terms, except that FERC’s definition includes not only actual energy but also “electric
19 capacity”).

20 FERC aggressively seized its mandate under PURPA. The Commission issued one
21 rule requiring “electric utilities to purchase electric energy from cogenerators and small
22 power producers at a rate equal to the purchasing utility’s full avoided cost.” *American*

(1984).

1 *Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983). Another
2 rule required “utilities to make such interconnections with cogenerators and small power
3 producers as are necessary to effect [full avoided cost] purchases or sales of electricity. *Id.*
4 FERC intended these transactions to reform an electricity generating industry that had not
5 lost its appetite “for traditional fossil fuels” or its “reluctan[ce] to purchase power from, and
6 to sell power to, ... nontraditional facilities. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982)
7 (footnote omitted); *accord American Paper Inst.*, 461 U.S. at 405, 417.

8 Confronted with FERC's aggressive implementation of Congress’s call to reform the
9 electric utility industry, recalcitrant incumbents and their allies in state public utility
10 commissions challenged the federal government’s constitutional authority. *See FERC v.*
11 *Mississippi*, 456 U.S. 742 (1982). Only when that effort failed did the opponents of
12 deregulation attack the full avoided cost rule on its merits. The Supreme Court,
13 however, unflinchingly upheld the full avoided cost rule as a proper discharge of FERC's
14 statutory responsibility to set “just and reasonable” rates. *See American Paper Inst.*, 461
15 U.S. at 413-18.

16 By requiring utilities to pay full avoided cost, FERC transformed a “statutory
17 ceiling” into “the floor price” for electricity supplied by QFs. Steven J. Ferrey, *Shaping*
18 *American Power: Federal Preemption and Technological Change*, 11 Va. Envtl. L.J. 47, 78
19 (1991). Almost certainly moved by the need to address the energy crisis of the 1970s, *cf.*,
20 *e.g., Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 497-98
21 (1988) (describing Congress’s passage of the Emergency Petroleum Allocation Act of 1973,
22 Pub. L. No. 93-159, 87 Stat. 627, as a response “to severe market disruptions by an embargo
23 on oil exports to the United States”); *FERC v. Mississippi*, 456 U.S. at 745 & n.2 (describing

1 PURPA as “part of a package of legislation . . . designed to combat the nationwide energy
2 crisis”), the Supreme Court endorsed the agency’s desire to “decrease . . . the nation’s
3 dependence on fossil fuels” by promoting “increased development” of cogeneration and
4 small power production. *American Paper Inst.*, 461 U.S. at 417; *see also Greensboro*
5 *Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1368 n.28 (N.D. Ga. 1986) (“FERC
6 has prescribed an above-market rate in order to encourage the development of qualifying
7 facilities.”), *aff’d*, 844 F.2d 1538 (11th Cir. 1988).

8 The rule conferred upon QFs a generous “range of privileges otherwise unavailable
9 to any other entity,” principally the power to force electric utilities to “purchase any energy
10 and capacity offered to them.” Ferrey, *supra*, at 78. Indeed, the rule arguably *created* the
11 entire market for power from cogenerators and small power producers. *See* Bernard S. Black
12 & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating*
13 *the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1348 (1993) (“PURPA . . .
14 foster[ed] the rapid growth of an independent power production industry.”). The competitive
15 edge that QFs enjoyed *vis-à-vis* other generators “stem[med] directly from the Congress’s
16 policy choice to encourage the sale of power by QFs rather than by traditional utilities.”
17 *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991). The high cost
18 of building new capacity or purchasing alternative sources of power only enhanced
19 PURPA’s allure. Cogenerators and small power producers eventually “account[ed] for more
20 than half of new generating capacity brought on line in the United States.” Jeffrey D.
21 Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992 — A Watershed for*
22 *Competition in the Wholesale Power Market*, 10 Yale J. on Reg. 447, 453-54 (1993).

1 Although PURPA was intended primarily “to promote conservation of power
2 resources and reduced reliance on oil, but not competition in wholesale power markets,” the
3 statute became a comprehensive response to flaws in the regulation of the electric utility
4 industry. *Id.* at 453. In addition to weaning incumbent electric utilities of their taste for
5 large-scale, vertically integrated generating facilities, *see FERC v. Mississippi*, 456 U.S.
6 742, 750 (1982), PURPA's boost for cogeneration and small power production would allow
7 the United States to realize the advantages of diverse and dispersed energy sources. *See*
8 F. Paul Bland, *Problems of Price and Transportation: Two Proposals to Encourage*
9 *Competition from Alternative Energy Sources*, 10 HARV. ENVTL. L. REV. 345, 383 (1986);
10 Charles G. Stalon & Reinier H.J.H. Lock, *State-Federal Relations in the Economic*
11 *Regulation of Energy*, 7 YALE J. ON REG. 427, 448-49 (1990).

12 PURPA thus illustrates the successful use of regulatory incentives to stimulate
13 technological innovation and thereby to lower the true social cost of power generation,
14 including pollution, over time. The IGCC Enabling Legislation, properly understood and
15 interpreted, proposes to do for integrated gasification combined cycle technology as PURPA
16 did for small power production and cogeneration. PURPA is rightly “hailed as the measure
17 introducing competition into the electric utility industry and thereafter aggressively
18 advancing it.” Richard D. Cudahy, *PURPA: The Intersection of Competition and*
19 *Regulatory Policy*, 16 ENERGY L.J. 419, 425 (1995). That statute and FERC’s full avoided
20 cost rule spurred “competition *for* a market, rather than competition *within* a market.” *Id.*
21 With proper implementation, Minnesota’s IGCC Enabling Legislation holds comparable
22 promise for steering this state toward a cleaner, more economical, and more sustainable
23 energy mix.

1 Incumbent Utility Reaction

2 **Q. Are you surprised that utilities other than Xcel Energy, such as Minnesota Power and**
3 **the Big Stone Partners, have been vocal and active opponents of the Mesaba Energy**
4 **Project, even though the proposed PPA involves only Xcel Energy?**

5 A. No. Incumbent utilities represent a singularly poor constituency by which to
6 measure the public interest in regulation. This is never more true than in the context of
7 regulatory schemes designed to spur innovation. It is striking that all of the regulated
8 utilities in this state are actively opposing an innovative energy project with unprecedented
9 levels of legislative support at the state and federal levels. The best explanation is the
10 simplest: incumbent utility companies understand the public interest to be coextensive with
11 one thing – maximizing the return on their shareholders’ investment. Minnesota law, of
12 course, disagrees. Section 645.17(5) of the Minnesota Statutes declares that the state
13 Legislature, in the absence of any contrary evidence, must be presumed to “intend[] to favor
14 the public interest as against any private interest.”

15 There are many components of the public interest. Among them are low price,
16 quality service, consumer choice, environmental protection, technological innovation. This
17 multifaceted principle rarely, if ever, coincides with an incumbent utility’s interest in
18 excluding competition and maximizing its profitability. Incumbent utilities are so blinded by
19 their pursuit of this singular objective, despite its lack of connection to the public interest,
20 that they do not hesitate to launch flamboyantly fatuous arguments in an all-out effort to
21 resist competitive entry into markets that they believe to be theirs by seemingly divine right.

22 Xcel’s argument regarding the putative inapplicability of subdivision 2(a)(7) of the
23 IEP Statute to a proposed innovative energy project exceeding 450 megawatts illustrates the

1 point nicely. So does Xcel's attempt to suggest that the IGCC Enabling Legislation flirts
2 with unconstitutionality pursuant to MINN. CONST. art. XII, § 1, on the supposed ground that
3 the presence of a single legislative beneficiary (Excelsior Energy) brings the law closer to
4 our state's prohibition against special laws. See Xcel Energy's Statement of the Case, at 8
5 n.9. What Xcel, rather remarkably, neglects to consider is how the entire body of public
6 utility regulation can be construed as special legislation designed to benefit a single private
7 entity.

8 What I have written regarding experts who advance pro-incumbent arguments in the
9 legal literature applies with even great force to incumbents who contest even the slightest
10 hint of competition or supervised unbundling and interconnection with their networks. See
11 *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of*
12 *Regulated Industries*, 67 OHIO ST. L.J. (forthcoming 2007) (available at
13 <http://papers.ssrn.com/abstract=771205>): "it is mathematically impossible to state the ratio of
14 [advocate's] rhetoric to [legal] support because it would require division by zero." *Id.*

15 **Q. Does that conclude your testimony?**

16 A. Yes.