

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

**ORDER
ON MOTION FOR
SUMMARY DISPOSITION**

This contested case proceeding was initiated by the Minnesota Public Utilities Commission (the Commission) by a Notice and Order for Hearing and Order Granting Intervention Petition issued on April 25, 2006. On September 25, 2006, mncoalgasplant.com (MCGP) filed a motion for partial summary judgment. Subsequently, Excelsior Energy, Inc., Northern States Power d/b/a Xcel Energy (Xcel Energy or Xcel), and the Minnesota Department of Commerce filed written responses to XLI's motion, and Administrative Law Judge Steve M. Mihalchick conducted a hearing on the motion on October 5, 2006. This matter is therefore before Administrative Law Judges Steve M. Mihalchick and Bruce H. Johnson for a determination on MCGP's motion for summary disposition.

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

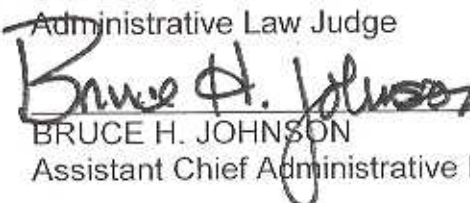
ORDER

IT IS HEREBY ORDERED, that MCGP's Motion for Partial Summary Judgment¹ is DENIED.

Dated: October 25th, 2006



STEVE M. MIHALCHICK
Administrative Law Judge



BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

¹ MCGP's motion was styled as a motion for "summary judgment." Since a dispositive motion of that kind is termed a motion for "summary disposition" in contested case proceedings, the ALJs will hereafter refer to it as such.

MEMORANDUM

I. Scope and Standard of Review

Summary disposition is the administrative counterpart of summary judgment in civil trial practice. Summary disposition is appropriate in cases where there is no genuine issue of material fact so that the moving party must necessarily prevail when the applicable law is applied to those undisputed facts.² When considering motions for summary disposition in contested case proceedings, administrative law judges generally follow the standards and criteria that have emerged in summary judgment practice under the Minnesota Rules of Civil Procedure.³ In that context, a genuine issue of material fact is considered to be one that is not sham or frivolous, and a material fact is one that is substantial and whose resolution will affect the result or outcome of a claim or defense.⁴

In summary judgment or summary disposition practice, the moving party has the initial burden of presenting evidence that establishes the existence of a prima facie claim or defense and of establishing that no material fact is in dispute. A nonmoving party can resist a motion for summary disposition by establishing material facts that are in dispute. However, when doing so, the nonmoving party must point to specific facts that are in dispute. General claims or contentions about factual disputes will not suffice.⁵ Also, when considering a motion for summary disposition, an administrative law judge must view the facts in the light most favorable to the non-moving party⁶—that is, resolve all doubts and factual inferences against the nonmoving party.⁷ Put another way, if reasonable people could differ about the evidence's meaning under the law, an administrative law judge should not grant summary disposition.⁸ This means that if the outcome of a claim turns on the weight to be given conflicting evidence or on the credibility of witnesses supplying testimony necessary to establish material facts, summary disposition is inappropriate.⁹

² *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K (unless otherwise specified, all references to Minnesota Rules are to the 1997 edition); Minn. R. Civ. P. 56.03.

³ Minn. R. Civ. P. 56; compare Minn. R. 1400.5500K and 1400.6600.

⁴ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984), rev. denied (Minn. 1985).

⁵ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

⁶ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

⁷ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-55 (1986).

⁹ 477 U.S. at 249-55.

II. Contentions of the Parties.

A. MCGP's contentions

On September 25, 2006, MCGP filed a motion for partial summary disposition in this matter. In general, MCGP contends that no genuine issues of material fact exist and that, as a matter of law, Excelsior's West Range Site does not meet the requirements of Minn. Stat. § 216B.1694, subd. 1(3) (sometimes the "IEP statute"), and that Excelsior is therefore not entitled to a power purchase agreement (PPA) based on a project constructed on the West Range Site. More specifically, MCGP argues in order to meet the statutory definition of innovative energy project, and therefore be entitled to a PPA pursuant to subd. (a)(7) of that statute, a project must be located "on a site that has substantial real property with adequate infrastructure to support new or expanded development." MCGP concedes that what the IEP statute expressly requires is for the Commissioner of Iron Range Resources (IRR) to designate sites that have adequate infrastructure; it further concedes that the Commissioner has, in fact, designated the West Range Site as having adequate infrastructure. However, MCGP argues that it is undisputed that the West Range Site, in fact, currently lacks "adequate infrastructure", that the IRR Commissioner's designation of that site was erroneous or fraudulent, and, therefore, as a matter of law, Excelsior cannot construct its project on that site.

B. Contentions of Excelsior and other parties.

On October 3, 2006, Excelsior filed a memorandum in opposition to MCGP's motion for partial summary disposition. Excelsior argued that MCGP's motion should be denied for three reasons: (1) The legislated delegated discretion to designate sites that would be suitable for an IEP project to the IRR Commissioner, and that Commissioner's designation is not subject to collateral attack in this proceeding. (2) Even if the IRR Commissioner's designation were reviewable in this proceeding, her exercise of discretion can be reversed only upon a showing that it was an "abuse of discretion" or was "arbitrary or capricious." (3) Whether the West Range Site has "adequate infrastructure to support new or expanded development" involves disputed questions of fact.¹⁰

On October 3, 2006, Xcel Energy filed a memorandum in response to MCGP's motion for partial summary disposition. In effect, Xcel argued that issues relating to whether Excelsior's proposed project satisfies statutory requirements involved genuine issues of material fact that need to be heard.

On October 2, 2006, the Minnesota Department of Commerce submitted a letter with comments regarding the pending motion for summary disposition. The Department took no position on the merits of MCGP's pending motion for summary disposition. Rather, the Department indicated that it generally foresaw

¹⁰ Excelsior actually argued that undisputed facts established that the West Range Site meets the statutory criteria.

the need for additional formal record development. No other parties filed written submissions relating to XLI's motion.

III. The IEP Statute does not require that an IEP must be located “on a site that has substantial real property with adequate infrastructure to support new or expanded development.”

Minn. Stat. § 216B.1694, subd. 1(3), defines an “innovative energy project” (IEP): in the following way:

Subdivision 1. **Definition.** For the purposes of this section, the term “innovative energy project” means a proposed energy-generation facility or group of facilities which may be located on up to three sites:

(1) that makes use of an innovative generation technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies;

(2) that the project developer or owner certifies is a project capable of offering a long-term supply contract at a hedged, predictable cost; and

(3) that is 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.

The statute does not require that an IEP be located “on a site that has substantial real property with adequate infrastructure to support new or expanded development.” Rather it requires that an IEP *have a designation* by the IRR Commissioner—albeit, a designation to that effect. Thus, the question in determining whether a proposed project by Excelsior on the West Range Site meets the definition of an IEP is whether that site has the Commissioner's designation. There is no genuine issue of material fact about that. MCGP concedes that the IRR Commissioner has, in fact, made the designation required by Minn. Stat. § 216B.1694, subd. 1(3).

IV. The IRR Commissioner's designation of the West Range Site Is Not Reviewable in This Proceeding.

What MCGP argues is that the IRR Commissioner's designation of the West Range Site as a “site that has substantial real property with adequate infrastructure to support new or expanded development” was clearly erroneous or fraudulent and therefore should be overturned by the MPUC. But a threshold question that must be addressed and resolved before addressing that issue is

whether the MPUC and, therefore the ALJs, have the authority to review the IRR Commissioner's designation and set it aside as clearly erroneous or fraudulent. Review of factual determinations underlying the IRR Commissioner's designation is clearly either a judicial or a quasi-judicial, function. The legislature did not expressly create a process for judicial review of that designation or a right of quasi-judicial review in a contested case proceeding under Chapter 14. Absent a statutory delegation by the legislature of quasi-judicial power to the MPUC to adjudicate whether the West Range Site, in fact, "has substantial real property with adequate infrastructure to support new or expanded development," the MPUC is powerless to look beneath the IRR Commissioner's designation. In summary, the legislature has given neither the MPUC nor any other Executive Branch agency jurisdiction to review and overturn the IRR Commissioner's designation. Therefore, the authority to review the IRR Commissioner's designation of the West Range Site must reside, if at all, in some court of competent jurisdiction in the Judicial Branch.

V. MCGP's Motion for Partial Summary Disposition Must Be Denied.

The ALJs conclude, as a matter of law, that the MPUC lacks jurisdiction to determine whether the IRR Commissioner's designation of the West Range Site is erroneous or fraudulent. In other words, the ALJs conclude that the question of whether the West Range Site meets the definition of IEP in Minn. Stat. § 216B.1694, subd. 1(3) is nonjusticiable in this proceeding. However, the ALJs do not necessarily conclude that infrastructure costs attributable to the West Range Site are immaterial. They may, in fact, be relevant to the MPUC's approval process under the IEP statute of proposed PPA between Excelsior in terms of where the public interest may lie. Those infrastructure costs may also be relevant to the MPUC's determination under the CET statute of whether Excelsior's IGCC technology is a least-cost resource.

S.M.M.; B.H.J