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January 19, 2007

VIA E-MAIL AND U.S. MAIL

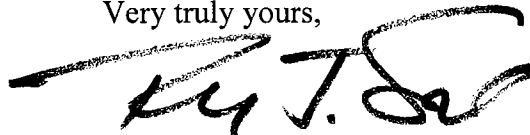
The Honorable Steve M. Mihalchick
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square
Suite 1700
Minneapolis, MN 55401-2138

**Re: In the Matter of a Petition by Excelsior Energy, Inc. for Approval of a Power Purchase Agreement Under Minn. Stat. § 216B.1694 and Determination of Least Cost Technology and Establishment of a Clean Energy Technology Minimum Under Minn. Stat. § 216B.1693
OAH Docket No. 12-2500-17260-2
MPUC Docket No. E-6472/M-05-1993**

Dear Judge Mihalchick:

Attached hereto please find the Minnesota Chamber of Commerce's Reply Brief. Also enclosed please find an Affidavit of Service to all parties of record.

Very truly yours,



Richard J. Savelkoul

RZS/clj
Attachments

cc: See Service List.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
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MINNEAPOLIS, MN 55401-2138**

**FOR THE PUBLIC UTILITIES COMMISSION
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IN THE MATTER OF A PETITION BY EXCELSIOR
ENERGY INC. FOR APPROVAL OF A POWER
PURCHASE AGREEMENT UNDER MINN. STAT.
§ 216B.1694, DETERMINATION OF LEAST COST
TECHNOLOGY, AND ESTABLISHMENT OF A CLEAN
ENERGY TECHNOLOGY MINIMUM UNDER MINN.
STAT. § 216B.1693

PUC Docket No. E6472/M-05-1993
OAH Docket No. 12-2500-17260-2

**MINNESOTA CHAMBER OF
COMMERCE'S REPLY BRIEF**

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I. INTRODUCTION

The Minnesota Chamber of Commerce ("Chamber") is not persuaded by arguments of Excelsior Energy and its affiliates ("Excelsior") in its Initial Brief. The Chamber will address relatively few issues in its Reply Brief, mainly to illustrate that intervenors have raised valid and compelling evidence challenging Excelsior's claims. The Chamber will also comment on the Minnesota Department of Commerce's ("DOC") policy statement that accompanied its Initial Brief.

Specifically, the Chamber would like to respond to Excelsior's position, contrary to evidence in the record, relating to "uncontested" matters; Excelsior's inconsistent and inaccurate interpretation of the statutes at issue (on public interest factors and economic development analysis); and DOC's Comments regarding a Power Purchase Agreement ("PPA") for \$110 per MWh.

The Chamber's arguments in its Initial Brief remain accurate, and as a result, the Minnesota Public Utilities Commission ("Commission") cannot approve any PPA at this time as statutory requirements are not met.

II. "UNCONTESTED" MATTERS

The Chamber was surprised to find that Excelsior's view in several instances was that its testimony was "uncontested" despite the voluminous testimony of the many intervenors opposed to this project as currently structured. These intervenors went to great lengths to credibly contest the issues that Excelsior purported to be "uncontested". The Chamber will discuss just one instance of an inaccurate claim of "uncontested" testimony; the factors to be weighed in determining public interest.

Excelsior claims that the "public interest determination" testimony presented by Professor Jim Chen is "uncontested". However, several parties presented testimony on the factors to be

considered in determining public interest, including, but not limited to, the Chamber's William Blazar and DOC's Elion Amit. Specifically, DOC maintains that public interest factors to be considered include: 1) ratepayer exposure to operational risk, 2) ratepayer protection from financial risk, and 3) reasonable price when considered with other socioeconomic factors. *See* Ex. DOC 3000, p. 9, (Amit Direct). The Chamber maintained in testimony the factors to be considered in determining if the PPA is in the public interest include "appropriately balanced in economic risks, the costs to ratepayers, and whether it fits into the state's long-term electric policy." MCC 7000, p. 3, (Blazar Reply). These are just two examples of where Excelsior, despite the clear evidence in the record, has inaccurately claimed its position is "uncontested". There are many more examples in the record.

As discussed above, the public interest factors are not "undisputed". The appropriate factors that need to be weighed in order to make a public interest finding are not limited to those in the testimony of Professor Chen. Excelsior's position on public interest factors is not only contested it is wrong. If the legislature intended for nothing other than the five factors to be weighed, the statute would have merely listed the five factors and will not have made reference to public interest or would have otherwise included limiting language. The court previously addressed statutory interpretation in its decision on the Xcel's Industrial Interveners' motion for summary judgment.

III. EXCELSIOR'S INCONSISTENT AND INACURATE STATUTORY INTERPRETATION

Public Interest Analysis

While arguing against summary judgment, Excelsior argued that the IEP statutory language in Minn. Stat. 216B.1694 subd. 2(a)(7), that the "commission may approve, disapprove, amend, or modify the contract in making its public interest determination" was to be read to

allow the Commission to modify the 450 MW referenced in statute, up to permit an order/PPA for more than 450 MW, because there was no limiting language included in the statute. Yet, now Excelsior maintains the same statute that requires making a "public interest" determination is actually limited in scope as to factors that can be considered, despite the lack of limiting language.

As the court decided in the motion for summary disposition, it must decide in this instance. The statute contains no explicit limitation or qualification on the factors to be weighed in determining public interest, therefore the factors are not limited to the five factors listed in statute. The Commission must look at the standard factors ordinarily used to determine public interest, in addition to those specifically listed in the IEP statute. The statute reads in part "Commission may approve, disapprove, amend, or modify the contract in making its public interest determination, taking into consideration the project's economic development benefits to the state; the use of abundant domestic fuel sources; the stability of the price of the output from the project..." Minn. Stat. 216B.1694 subd. 2(b)(7). There is no limiting language in the statute. The plain meaning of the words in the statute must be used rather than speculating why certain words were included or limiting words were not included. *See Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 681 (Minn. 2004).

If the Commission were to look beyond the clear language in the statute and review the intent of the statute that is in the record, the Commission would conclude that there is no limitation. As pointed out in the Chamber's Initial Brief, all of the political support letters submitted with Excelsior's filing specifically referenced "ratepayers" and "cost" or "consumers, economy" and "benefits", in either case, the letters of support reinforce the Commission's standard analysis of public interest be used and statute does not intend to limit the analysis in any

way. *See* Ex. EE 1012, Exhibit E: Response correspondence from Governor Pawlenty dated May 23, 2003, and Ex. EE 1013, Exhibit E: Response correspondence Minnesota legislators Mike Beard and David Tomassoni dated October 5, 2004. Regardless, the statute is clear. There is no limiting language in the statute. The Commission is allowed and must make a public interest determination based on the standard factors used by the Commission. Cost and reliability and other factors and the impacts to Xcel's ratepayers and Xcel's system ordinarily are and must now be weighed in any decision related to public interest.

Least Cost Analysis

Excelsior later attempts to make a similar statutory interpretation argument, suggesting that there are limits on the factors that can be used in determining least-cost despite the language in the statute that clearly includes no limitation. Excelsior does so by arguing that the cost to Xcel's system and that its Strategist analysis is irrelevant in determining whether Excelsior is a "least-cost" resource. Clearly, Excelsior would like the Commission to read into the statute what Excelsior thinks was meant rather than giving the language in statute its plain meaning. This argument, likewise must be rejected, not only must the system cost be considered in any "least-cost" determination, but the Chamber finds Xcel's analysis persuasive, as it is based on methods used and accepted in prior proceedings in front of the Commission.

Economic Development Benefits Requirement

Statute does not limit determination of economic developments to one region of the state. A finding of existence of economic development benefits to the state requires that a dynamic economic study be performed. Excelsior wants the IEP statute to favor projects that are located in depressed regions of the state and only to consider the economic impact to that area of the state. Excelsior would like to disregard the economic effects to other regions and maintains that pursuant to statute "size, type and timing" considerations are not applicable to this proceeding.

This is not the case. Minn. Stat. 216B.1694 subd. 2(a)(7) requires consideration and weighing of "economic development benefits *to the state*" (emphasis added). Necessarily, the "size, type and timing" will affect the economic benefits (or detriments) of Excelsior's project to the state.

If Xcel has to buy more power than needed, which is more expensive than otherwise would be purchased, at an earlier time than needed pursuant to its resource plan, there will be a negative impact which must be weighed to determine if there are economic developments benefits to the state. As discussed in the Chamber's Initial Brief, Excelsior has not even attempt to do such a dynamic study, so evidence is not in the record that can satisfy a finding that there are economic development benefits to the state.

While the Chamber recognizes there are issues as to whether Excelsior has met the statutory burdens in several areas not briefed by the Chamber, the Chamber has demonstrated that Excelsior has not and cannot prove that there are economic development benefits to the state as a result of the project. Therefore, at a minimum, with respect to that statutory requirement, Excelsior has not met its burden.

IV. DEPARTMENT OF COMMERCE'S COMMENTS

The Chamber appreciates DOC's comments and attempts to protect ratepayers with a firm price. The Chamber disagrees with the DOC that a PPA could be signed based on the criteria that it proposes. It questions the appropriateness and of the price proposed as a starting point by the DOC. As the DOC recognizes, the price set forth is a premium. That premium is far too great considering the risks that Xcel and its ratepayers would be taking, even if the PPA was materially revised.

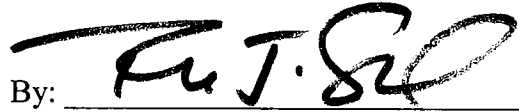
V. CONCLUSION

For the reasons stated in the Chamber's Initial Brief, as well as herein, Excelsior has not yet demonstrated that it has satisfied the statutory requirements of being in the public interest

after weighing all of the relevant factors, nor that it can demonstrate that its project would provide economic development benefits to the state. As such, Excelsior's PPA must be rejected at this time.

Dated: January 19, 2007

Respectfully submitted,

By: 

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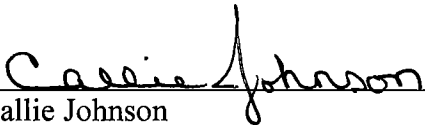
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CHAMBER OF COMMERCE**

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STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

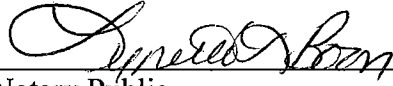
Callie Johnson, of the City of St. Paul, County of Ramsey, State of Minnesota, being duly sworn upon oath, says that on the 19th day of January, 2007, she served the attached Minnesota Chamber of Commerce’s Reply Brief on the following person(s) at their last known address, by e-mail and by placing a true and correct copy of said document in an envelope addressed to said person at his/her last known address, and placing said envelope with said contents in the U.S. Mail at St. Paul, Minnesota:

See Service List.

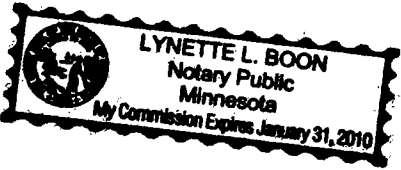


Callie Johnson

Subscribed and sworn to before me
this 19th day of January, 2007.



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